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April 6, 2007

Mr. Geoffrey E. Lyle
Section Supervisor,
Business Taxes Committee Section
State Board of Equalization
450 N St., MIC: 50
Sacramento, CA 95814

Re: Interested Party Proceeding – Regulations 1803 and 1802. (Sales negotiated in State and fulfilled by shipment from out of state.)

Dear Mr. Lyle:

This letter responds to the Board Staff's March 13, 2007 Second Discussion Paper on the above subject, and the March 22 Interested Party Meeting held in Sacramento that followed. The primary substantive issue concerns whether the legal incidence of the Bradley-Burns sales tax is on the conduct of sales activities in the taxing jurisdiction within the meaning of RTC Sections 7202 and 7205 (and most of the BOE Regulations interpreting those provisions), without regard to where the "sale" might have been completed for commercial and state sales tax law purposes.

A major procedural issue concerns whether the Board Staff's Discussion Papers are correct in implying that clarifying the current regulations retroactively as requested would also necessarily require full retroactive correction of all the other outstanding claims involving whether Bradley-Burns sales tax applies to the transactions now at issue before the Board Members in Cities of Los Angeles and San Jose , Case ID 04-009. None of the other similar cases have yet been presented to the Board Members, and therefore, consideration of their disposition under Section 7209 of the Revenue and Taxation Code in this Interested Party proceeding would appear to be both premature and unnecessary. Neither Discussion Paper addressed this concern.

Introduction

MuniServices LLC ("MSLLC") contends that the initial Board Regulations implementing the Bradley-Burns statute in 1956 conclusively sourced local revenues from "exercise of the privilege of selling personal property" to the "place of business" where the exercise occurred, without regard to where title or ownership passed. These regulations were altered **retroactively** by the Board in 1970 and 1971 without statutory authority in an unlawful attempt to cause the sales at issue to be subject to the Bradley-Burns use tax rather than the sales tax. These drastic changes caused revenues to be distributed through county pools, rather than directly to the jurisdiction where the place of business that originated the sales was located. Thus, local revenues that had been distributed to many jurisdictions directly were shifted to formula distribution through county pools overnight.

In 1956, and today, California's state sales tax and its commercial law (since 1965 the Uniform Commercial Code ("CUCC"), but previously the Uniform Sales Act ("USA"), former Civil Code Sections 1721, et seq., determined the time and place of sale with regard to where and when the "property" ("ownership" or "title") in the tangible personal property sold transferred to the purchaser seller. The state sales tax under RTC Section 6051 conditions application of that tax on completion of a transaction "in this state."

Thus, the commercial law test of where ownership passes has always applied in determining whether the state sales tax applies. But the "in this state" test does not appear in RTC sections 7202 and 7205, the Bradley-Burns sales tax statute, either directly or by cross-reference, and therefore the commercial law test is irrelevant to how the local sales tax applies. Nevertheless, Board Staff has administered the local tax as if it did since at least 1986, and probably as early as 1971. (In 1986, this problem was first brought to the attention of the Board by a reallocation request which is still outstanding and undecided.)

The Appealing Cities in Cities of Los Angeles and San Jose, claim that the Bradley-Burns statute does not incorporate a geographic "place of sale" test based on commercial law, because it has always contained a "conclusive presumption" that Bradley-Burns sales tax revenues are to be sourced to the place of business where the sales orders are taken or negotiated. (See 1956 version of present 18 Cal. Code Regs. Section 1802[1] attached as Exhibit A-1, originally numbered as Regulation 2202.)

The Appealing Cities also contend that the Bradley-Burns statute was intentionally drafted in this manner, because the cities, whose authority to adopt city business license or sales taxes preceded enactment of the Bradley-Burns statute, were concerned that there be no "leakage" of revenue under the new statute similar to that suffered under the existing ordinances which, in most cases, exempted sales delivered outside the taxing jurisdiction. That exemption provided a level local tax environment and protected taxed city retailers from untaxed suburban competition. (See 1956 bulletins describing Bradley-Burns issued by the League of California Cities ("League") and the County Supervisors Association of California ("CSAC") attached as Exhibits B-1 and B-2.)

The Petitioners also contend that Regulation 2203, as first adopted in 1956, was administered to recognize the "conclusive presumption" adopted in Regulation 2202 that Bradley-Burns revenues were to be sourced to the retailer's California "place of business" where sales were negotiated or orders taken. When adopted and until revised in 1970, Regulation 2203 contained a cross-reference to Regulation 2015 (Ruling 55), the predecessor of present Regulation 1620. (See 1956 version of present Regulation 1803 attached as Exhibit A-2 and originally numbered Regulation 2203.) Regulation 2015 included precise language that sales tax applied to the type of transaction at issue in this proceeding. (See 1956 version of present Regulation 1620 attached as Exhibit A-3 and originally numbered Regulation 2015, subdivision A. 2. (a) (1).)

[1] All regulation references is this letter are to 18 Cal. Code Regs.

At that time, most sales of this type that were delivered from out of state to a California purchaser were subject to the state sales tax. The case law, as exemplified by Diebold v. State Board of Equalization (1959) 168 Cal App. 2d 628, used a facts-and-circumstances test to determine where ownership transferred under the USA and placed the burden of proof squarely on the taxpayer to prove that the sales tax did not apply, when the negotiations occurred at a fixed place of business in California. (See 1961 version of present Regulation 1628, attached as Exhibit A-4 and originally numbered Regulation 2028.) In 1965, that regulation was strengthened to require such proof to be "clear and convincing." (See 1965 version of present Regulation 1628 attached as Exhibit A-5 and numbered Regulation 2028.)

Because this heavy burden of proof could not often be met conveniently by taxpayers they usually paid the state as well as the Bradley-Burns sales tax during the period 1956-1971on this type of transaction. Only in late 1971 was Regulation 2028 renumbered as Regulation 1628 and the present provisions included in it, particularly subdivision 1628 (b) (3) (D) which shifted the "default" rule for determining which tax applies for state purposes to "use" tax. (See 1971 version of Regulation 1628 attached as Exhibit A-6.) In 1970, the previous cross-reference to Regulation 2015 (Ruling 55) in Regulation 2203 was also dropped when both regulations were revised and renumbered as Regulations 1620 and 1803, respectively. (See Exhibits A-7 and A-8.) The latter change removed any reference that sales tax applied to this type of transaction from the Bradley-Burns Regulations. At the same time, the requirement was added to renumbered Regulation 1802 (from Regulation 2202) (a) (3) that local sales tax applied to this type of sale only if title passed in California (See Exhibit A-8), a direct repudiation of the 1956 agreement reflected in Exhibit A-1.

The cumulative effect of revising and renumbering the original governing regulations in the period 1970-71 was to attempt to "flip" them to be subject to use taxes rather than sales taxes for both Bradley-Burns and state purposes. This effort fails without question for Bradley-Burns purposes, because there is no statutory authority for it.[2]

Board Staff has claimed that the Appealing Cities have no corroboration for this account of the early history of the Bradley-Burns tax, but that defense also fails. After California's enactment of the Uniform Commercial Code in 1963, RTC Section 6010.5 was adopted in 1965 to establish a "geographic-passage-of-title" rule based on physical location of the property at the time of the sale for the state sales tax, because there was concern that in-state transactions might be exempted by passing ownership via a transfer of documents of title outside California under the newly enacted CUCC. This problem

[2] These efforts also failed for state tax purposes, because they were not grounded on any related statutory change and were contrary to RTC Section 6091 which places the burden of proof on the taxpayer to prove that state sales tax does not apply. (See, Diebold v. State Board of Equalization, supra, p.2; CUCC section 2401, which went into effect in 1965, is also contrary to the sweeping change reflected in Regulation subdivision 1628 (b) (3) (D), because it permits passage of bare legal title without ownership to be used as a regulatory test in certain areas of "public law," only where such had previously been the case. However, it was not until 1971 that subdivision 1628 (b) (3) (D) separated ownership from passage of legal title in a manner not contemplated by the CUCC and not permissible under the parallel definitions of "sale" contained in CUCC section 2106 and RTC section 6006 (a).

was addressed in RTC section 6010.5 by stating that sales occurred for state sales tax purposes where the property was located at the time ownership passed. This provision expressly excluded both "Parts 1.5 and 1.6," the Bradley-Burns and the Transactions Tax statutes from it with the approval of the State Board of Equalization.[3] Therefore, it is clear that the Board must have been administering the Bradley-Burns sales tax in 1965 on the understanding that the place where ownership or "title" transferred was irrelevant. (See legislative history of RTC Section 6010.5 attached as Exhibit C-1 through C-3.)

That was what Regulation 2202 (a) stated (See Exhibit A-1), and when Regulation 2028 was renumbered and revised in 1971, (See Exhibit A-6), subdivision 1628 (b) (4) also stated that the place where title passed was irrelevant to the Bradley-Burns sales tax.

In fact this understanding was entirely consistent with the language of both Regulations 2202 and 2203, as they were originally adopted in 1956 and remained essentially unchanged until 1970. (See Exhibits A-1, A-2, A-8, and A-9.)

Board Staff's Allegations Rebutted

The Board's Second Discussion Paper contains several allegations that are incorrect and require rebuttal. The rebuttals are as follows:

1. Present Regulation 1803 is incorrect in requiring the Bradley-Burns use tax to apply if the State use tax applies. The County and City ordinances are independent of the State sales and use tax statute, and the Bradley-Burns statute specifically excludes the State use tax statute. (See RTC subsection 7203 (e).) The county and the city use tax provisions also contain exemptions from the use tax if the local sales tax applies. See RTC subsections 7202 (h) (5) and 7203 (c). Therefore, the Bradley-Burns sales tax must be applied first to determine whether it applies. If it does, the local use tax cannot apply.

2. The case law regarding where a sale occurs for state tax purposes and Regulation 2028 (renumbered Regulation 1628 in 1971) support MSLLC's interpretation that the type of transactions at issue in this proceeding were normally treated as subject to sales tax by the Board's regulations during the 16-year period from 1956 through 1971, unless the taxpayer could provide, first detailed proof, and later "clear and convincing" evidence to the contrary. (See Exhibits A-4 through A-6.)

3. In interpreting whether the Bradley-Burns sales tax applies, the local ordinances and the Bradley-Burns statute govern. There is no statutory

[3] RTC Section 6010.5 reads as follows:

> "**Place of Sale.** For the purposes *of this part* [1], the place of the sale or purchase of tangible personal property is the place where the property is physically located at the time the act constituting the sale or purchase, *as defined in this part* [1] takes place." [Italics supplied.]

language that requires the state sales tax to govern whether the Bradley-Burns sales tax applies, and there is both statutory and regulatory language that exempts Bradley-Burns from the "place of sale" rules for State sales tax. (See, RTC Section 6010.5 and Regulation 1628 (b) (4).)

4. The provisions of Regulation 1628 (b) (3) are applicable in determining whether transportation charges are taxable for both state and Bradley-Burns sales taxes, because RTC Section 7205 provides that the state treatment of such charges will govern for Bradley-Burns purposes. The policy behind this rule was that the principal sponsors of Bradley-Burns wanted the local tax base to match the state base exactly in order to reduce the local tax compliance difficulties retailers had experienced with the diverse rates and exemptions of the pre-Bradley-Burns city ordinances.

5. The proposed clarifications for Regulations 1802 and 1803 would not require the retailers to address compliance issues that they do not already face. Their submission suggests, that a few may not now be complying with the current origin-based Bradley-Burns sales tax, even for transactions that transfer ownership in California.

6. The specific revenue losses anticipated by CSAC are based on a flawed 1996 study of that issue by Board Staff. The notion that the City of Los Angeles would lose approximately $ 1 MM of revenue from the proposed changes is ludicrous. That study also does not take into account the county one-quarter percent tax which is the principal source of Bradley-Burns revenue for counties. Therefore, its specific "winners and losers" predictions are misleading and should be ignored. The counties were also badly misled in 1996 on this issue, because they opposed the settlement proposal before the Business Taxes Committee at that time under the misapprehension that counties as a whole would be substantial net losers under it. That cannot be correct.

7. Staff should assess the potential impacts of the proposed changes in conjunction with qualified representatives of local government. Management of the necessary corrections of all past misallocations that are still pending and the transition to applying the Bradley-Burns statute and ordinances to this type of transaction should be conducted separately from this regulatory proceeding and in a fair, efficient and equitable manner that reflects the Board's obligations under the Bradley-Burns contract and RTC Sections 7209 and 7204. The only corrections necessary to consider concurrently with this proceeding are limited to those that would be required to dispose of the ruling in Cities of Los Angeles and San Jose that was taken under submission pending this regulatory proceeding.

The Proposed Amendments

The proposed amendments to both Regulations 1802 and 1803 are intended to conform them to the agreement reached in March of 1956 that if a local place of business "participated" in a sale by taking the order or negotiating the sale, a "conclusive presumption" would be apply that the sale occurred there. The only exception was to be that the state rule governing where a sale occurs for transportation charge inclusion purposes would also apply in calculating Bradley-Burns taxes, as required by RTC Section 7205 (a). This treatment was then provided in Regulation 2203 (now Regulation 1803, as renumbered and revised in 1970.) The proposal for Regulation 1802 (a) (3) eliminates only the wording that added an in-state-title-passage test that was contrary to RTC Section 7202 and the local ordinances which do not incorporate the "in this state" language that appears in RTC Section 6051, the state sales tax statute.

At the second interested party meeting, Board Staff suggested only that: i.) the current definition of "participation" used in practice be made more specific in the regulation draft to prevent insubstantial activities from meeting that definition; and ii.) leasing transactions be excluded from being affected one way or the other by these clarifications. Language and a transition rule have been added to the clarifying amendments provided in Exhibit D as suggested by Staff.

Technical Discussion

1. Sales Tax General Bulletin 52-5

   The express language of the Bulletin reflects that the purpose of the ruling was to apply the geographic title passage test to define the "in this state" requirement of the state sales tax contained in RTC section 6051. Neither Ruling 55 nor Regulation 2015 was revised in light of the ruling, so it is incorrect to interpret it as applicable to the Bradley-Burns sales tax or for any purpose other than locating the place of sale for state sales tax purposes. By its own terms, the ruling has no relevance to how the Bradley-Burns sales tax applies, because there is no statutory requirement that the incidence of the state sales tax also govern for Bradley-Burns sales tax purposes. In fact, Exhibit A-1 indicates clearly that Board Staff and the State Attorney General agreed in 1956 that the incidence of the local tax was "conclusively presumed" to be at the place of business where the sales activities were conducted.

   It is also very clear that a 1952 staff interpretation of Ruling 55 cannot alter the intent and meaning of the independent Bradley-Burns sales tax statute enacted three years later. Nor can it alter the "conclusive presumption" provided in RTC Section 7205, as reflected in the initial and later versions of

Regulation 2202 that participation in a sales tax transaction sources the local tax to the place of business where the participation occurs. That rule remained in effect, until Regulation section 2202 was amended in 1970 and renumbered as 1802, to include present subdivision (a) (3), which added an in-state title passage rule for the first time as a condition for applying the Bradley-Burns sales tax. There was no statutory authority to make that change, and therefore, it has always been invalid.

Ruling 55 (also known as Regulation 2015)

The 1956 cross-reference to "Ruling 55" or Regulation 2015 (not "2105" as stated) in subsection (a) of Regulation 2203) contains no reference to Sales Tax Bulletin 52-5 or to the "title" passage rule that Board Staff now claims to have been automatically incorporated under staff policy in Regulation 2015. If that had actually been the case, there would have been no reason to add the extensive references to title passage that appear in state sales tax regulations 1620 and 1628 (b) (3) (D) and in Bradley-Burns Regulation 1802 (a) (3) in 1970 and 1971.

The primary function of Ruling 55 and Regulation 2015 was how the federal constitution's negative ("dormant") commerce clause had been interpreted to apply to state and local sales taxes. These rules apply across-the-board to both state and local tax measures. Without another purpose in mind, there would have been no reason to add the cross reference to these authorities in Regulation 1803, because federal constitutional considerations will always be applicable to a local sales tax.

Therefore, the presence of language denying an explicit title passage rule in Regulation 2015 was probably the reason for the cross reference. Subdivision A. 2. (a) (1) thereof indicates unambiguously that the state sales tax applies to transactions of the sort involved here. No reference to passage of title appears in the body of the regulation at all, because the possible constitutional significance of such a rule had been removed by the decision of the U. S. Supreme Court in Norton Co. v. Dep't of Revenue of the State of Ill. (1950) 340 U. S. 534. That opinion permitted Illinois to impose its privilege tax on conducting sales activities at a permanent place of business in the state, even though ownership or title to the goods sold usually passed on shipment from Illinois. Thus, the U. S. Supreme Court's ruling in Norton directly supports the appealing cities' position in this proceeding.

We must also bear in mind that no geographic title passage rule had been included in the sourcing rules adopted in Regulation 2202 some six weeks earlier, and that the general rule is that regulations adopted contemporaneously are to be harmonized to the extent possible, in interpreting their meaning. As indicated previously, inclusion of a title passage test in

Regulation 2203 may also have been intended only to supply technical regulatory support for the statutory requirement in RTC Section 7205 (a) that the treatment of freight charges for state purposes control those for Bradley-Burns purposes.

2. The Diebold Case.

The leading California precedent on place of sale is Diebold, supra, , which is cited as authoritative in the Board's Business Taxes Guide, v. 1, p.1078 (2004-1) under RTC Section 6051. Board Legal Staff has claimed to rely on that case for years in interpreting when and where the Bradley-Burns sales tax applies. It applies a facts and circumstances approach based un the underlying commercial law governing where a sale is completed.

Nonetheless, Staff has carefully avoided any detailed discussion of that opinion in both Discussion Papers because it clearly does not support the "bright-line' test they seek to apply to Bradley-Burns sales under CUCC subdivisions 2401 (1)-(4), as interpreted by Regulation 1628 (b) (3) (D).

The facts in Diebold were similar to those in Cities of Los Angeles and San Jose in that the Taxpayer had permanent places of business in California that originated sales to California purchasers that were fulfilled by shipment directly to the purchasers. Although the case was decided after Bradley-Burns was adopted, the periods involved appear to have preceded April 1, 1956 when it went into effect. The opinion never mentions city sales taxes and analyzes the transactions at issue based upon the terms of the governing contracts or invoices and related facts. One set, the so-called "bank agreements," was determined to constitute "delivery" contracts under the USA, Civ. Code Section 1739 (5), only because they provided, inter alia, that the retailer was to pay the shipping costs. Another set of three contracts was determined to transfer ownership of the property outside California, because they indicated that "title" was to pass upon shipment from Ohio and the USA, Civ. Code Section 1739 equated that term with the "property" meaning full ownership. It was held that the sales tax could not be applied to these sales, presumably because they did not occur "in this state" under RTC Section 6051, and the use tax was not at issue.

The third set of agreements provided that the Taxpayer retained "title" as security until payment in full had been received, and the facts indicated that installments remained to be paid after delivery had occurred in California. These transactions were held to be subject to the sales tax because the Court determined that possession had transferred in California, not upon shipment in Ohio. RTC Section 6006 (e) still states that such transfers of "possession"

constitute taxable "sales" for California sales tax purposes, but Board Staff refuses to recognize this statutory rule.[4]

Thus, Diebold, the leading California opinion for applying the state sales tax to shipments from out of state, conducted a detailed analysis of the contracts and the underlying commercial law to determine where "property" or ownership of the property transferred. Certain contracts were construed to constitute "delivery" contracts, even though they didn't say so in so many words or contain any "FOB" terminology, because the taxpayer was unable to satisfy its burden of proof that the sales tax did not apply.

Therefore the basic methodology used in Diebold is still good law. The only change mandated by the CUCC is that now the analysis must be performed under the revolutionary revisions of sales law contained in Division 2 to determine when the sale process has progressed to a point where it may be concluded legally that the purchaser has become the owner of the property and the seller is entitled to receive or retain payment. Under both the CUCC and, as exemplified in Diebold the prior USA, this analysis is to be performed on a step-by-step basis, at least for California state sales tax purposes. There is no California case law that holds the Legal Staff's "bright-line test" under CUCC Section 2401 (2) governs characterization of the state sales tax.

3. Relationship of Regulation 1628 and Regulation 1803.

The statement of substantive law quoted from Ruling 58 in the Second Discussion Paper seems to be in general agreement with the 1961 version of Ruling 2028, (Exhibit A-4) which deals with the same subject. However, the latter does not mention Ruling 58 and therefore appears to have superseded it. The principal difference between "Ruling 58" as quoted and the 1961 version of Regulation 2028, as set forth in the 1961 version, may simply be that the latter stated clearly and extensively that the taxpayer had the burden to prove where the sale occurred for purposes of determining whether it took place before the freight charges had been incurred so that they could be excluded from the tax base, or after, in which event they could not.. The California Supreme Court's 1959 ruling in Select Base Materials v. State Board of Equalization (1959) 51 C. 2d 640, 645 confirmed that delivery or freight charges would often have to be subject to tax if the sale occurred after delivery

[4] A similar transfer-of-possession rule applies under the definition of taxable "sale" contained in RTC Section 6006 (f) for transfers of "title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication." Both provisions defining transfers of "possession or title" as "sales" under RTC Section 6006 (e) and (f) are inconsistent with the Staff's current "bright-line test" under CUCC Section 2401 (1)-(4), because that test fails to recognize transfers of possession as taxable "sales" and is not based on when and where ownership passes for general commercial law purposes. Allocation appeals involving both RTC subdivisions 6006 (e) and (f) are pending.

to the purchaser. Diebold recognized that the taxpayer has the burden of proof that the sales tax does not apply after delivery.

To the extent that Regulation 1802 recognizes that "participation" in sales activity is central to determining where a sale occurs, it is entirely consistent with RTC section 7202 which imposes the Bradley-Burns sales tax on exercising "the privilege of making sales at retail." Without "participation" as specified in Regulation 1802 (a), there can be no exercise of the activity on which RTC Section 7202 imposes the tax.

It is incorrect for the Second Discussion Paper to assert, at page 8, that the place where title or ownership passes for purposes of Regulation 1620 and 1628 is also relevant for purposes of Regulations 1802 and 1803, except to the extent that the "freight charges" rule of RTC Section 7205 (a) ties their treatment for Bradley-Burns purposes to the state rule. Nor should it be overlooked that RTC Section 6010.5 states that placement of the sale at the physical location of the property when the sale occurs does not apply to Part 1.5, Bradley-Burns, but only to Part 1, the state sales and use tax.

RTC Section 6010.5 is the statute that Regulation 1628 (b) (4) is based on, and it was adopted in 1965, nine years after Bradley-Burns went into effect in 1956 and six years before the renumbering and revision of Regulations 2015, 2202, 2203, 2028 had been completed.

4. Relationship of Regulation 1802 ("Place of Sale and Use, etc.") and Regulation 1803 ("Application of Tax.)"

Assuming (without conceding) that the Second Discussion Paper is correct in claiming that that only Regulation 1803 (and its predecessor, Regulation 2203) and not 1802 (and its predecessor Regulation 2202) interprets RTC Sections 7202, and 7203 then it has been invalid since adoption in 1956. This is because it fails to accurately reflect the provisions of those sections.

The ordering rule implicit in both the state and the local sales and use taxes is that applicability of the sales tax is always to be considered before applicability of the use tax. RTC Section 6401, and subdivisions (h) (5) of RTC section 7202 and (c) of 7203 all state that transactions are exempt from the use tax under both statutes if the sales tax applies. This is to be expected, because the use tax is supposed to "back up" and be complementary to the sales tax. Another way of saying this is that if the sales tax applies, there is no need for a use tax and it does not and cannot apply. This firm rule is not reflected anywhere in present Regulation 1803.

Nor is there any statutory support for the rule stated in Regulation 1803 that the Bradley-Burns use tax must apply if the state use tax does. In fact TRC

section 7203 has always expressly excluded the basic state use tax statute, RTC Section 6201, from being incorporated by reference in Bradley-Burns. Thus it is clear that the Bradley-Burns use tax applies only on its own terms and was never intended by the Legislature to be governed by state rules.

6. Issuance of a Seller's Permit

The type of permit issued for a place of business cannot alone determine the character of the local tax, because the internal administrative policies governing issuance of permits are not necessarily reflective of statutory requirements regarding which type of tax applies. Also, the first sentence in the second paragraph of this section on page 9 of the Second Discussion Paper is incorrect to the extent it implies that negotiating, conducting or managing the sale process is not sufficient to attract a retail seller's permit. (See the broad language requiring registration of "each place of business in this state at which transactions relating to sales are customarily negotiated . . . ." Regulation 1699 (a).)

7. Receipt of Schedules by Out-of-State Sellers.

Again, although the schedules issued to retailers subject to the sales tax should accommodate its accurate reporting, they are strictly administrative and cannot alter the statutory nature of the tax.

8. When May Local Tax Revenues Be Reallocated?

To the extent that the Board Members have discretion under RTC Section 7209 to correct incorrect distributions, it should consider exercising that discretion to make correction in light of the agreed facts in Cities of Los Angeles and San Jose and the lack of any statutory support for treating the transactions at issue as subject to Bradley-Burns sales taxes.

Resolution of other pending cases, including the several categories of "Mass Appeal" cases outlined in the Board Staff's First Discussion Paper should await a more accurate estimate of the gross and net amounts of the actual corrections that would be required and how to make them as creatively and equitably as possible. The Board should recognize that, as the Bradley-Burns contractual agent to collect and distribute sales and use tax revenues of all cities and counties in California, it has an obligation to perform them, including those arising under RTC Sections 7204 and 7209, as fully and equitably as possible.

9. LAO Report.

The LAO Report does not mention the type of transaction involved in this Interested Party Proceeding as being particularly vulnerable to the rebate contracts described in it. In fact, to MSLLC's knowledge, none of the pending Mass Appeal or other claims of the type involved here, including those arising in Cities of Los Angeles and San Jose, have rebate agreements in place.

The expansion of the annual volume of transactions subject to the sales tax as opposed to the use tax is expected to be minimal, in any event. The amounts at issue in Cities of Los Angeles and San Jose are relatively modest.

MSLLC also believes that the 1996 Board study is not a reliable basis for calculating the net amounts at issue under the Mass Appeal and related cases that are still pending Board hearing. The net aggregate adjustment to county pools predicted by the 1996 BOE study was approximately $ 13.4 MM per annum. Many of the 895 claims studied at that time involved taxpayers that are no longer operating in the claiming jurisdictions and for which no replacement claims have ever been filed. MSLLC's records indicate that only approximately 100 of those businesses are operating in those locations today.

Thus, severe erosion of the original number of continuing claims has occurred over the intervening 12 years since the figures used in that study were gathered, and therefore it would be very misleading and highly inaccurate to multiply the $ 13.4 MM times 12 to calculate a net estimated correction amount under current conditions. [5]

10. Direct Impact on Retailers.

a. Retroactivity

First, it should be recognized that the liability of retailers affected by the clarified regulations would not be greater than they now have, because, by definition, all of them have places of business in California and are therefore liable to collect and remit the use tax under the current Board policies regarding this type of sale. The extent to which Board Staff would be required to make overly intrusive

[5] We also note that even the $ 13.4 MM estimated annual correction amount was only approximately 4.5 % of the aggregate estimated county pool amount of $ 300 MM for the 1994-95 period. (See BOE Annual Report 1994-95, Table 20. The ten percent pool estimate is from other Board estimates. See First Discussion Paper Regulation 1802 (d) (1), dated January 20, 2007. Since all the claims studied in 1996 are no longer currently valid and have been eroding constantly since 1996, their continuing percentage of the aggregate annual pools would likely be much less than the 4 to 5 percent estimated for 1994-95.

inquiries regarding old returns that Board Staff may have allowed to be destroyed is also a matter for careful consideration.

b. State Variations

It is incorrect that "every other state in the country" taxes this type of transaction in accordance with the method that California has imposed since 1971.[6] Secondly, local taxes are often sourced to the place of negotiation in order to protect local revenues.[7] In any event, the increase in complexity of the California sales and transactions tax systems would be marginal only, certainly not enough to cause it to burden interstate commerce unreasonably, especially since all the taxpayers involved are understood to have physical nexus in the state.

The complaint that some software systems do not accommodate sourcing local tax allocations and rates based on the place of negotiations, as required for all Bradley-Burns sales taxes whether shipment is from out of state or in-state, creates an inference that some retailers may be misallocating Bradley-Burns revenues. That is why jurisdictions retain consultants and Board Staff conducts periodic audits. If the shipment is from an in-state warehouse, allocation to the place of sale negotiation is mandatory. Furthermore, both retailers and Board auditors have devised sampling methods for locating sales of-multiple location sellers that have been used for years with general acceptance by both Board Staff and local jurisdictions alike.

Also, sourcing all local taxes, including both Bradley-Burns and the District or Transactions tax on a destination basis, for both in-state and out-of-state shipments is incorrect and suggests that any taxpayer that does so may be both overpaying and underpaying its transactions tax liability while misallocating local taxes at the same time.

c. Transaction and Rate Tracking and Collection and Reporting Duties of Retailers.

[6] See, e.g., Matrix Funding Corp. v. Utah State Tax Commission (2002) 52 P. 3d 1282, 2002 UT 85; A. D. Store Co., Inc. v. Executive Director of the Department of Revenue of the State of Colorado (2001) 19 P. 3d 680, 2001 CJ C. A. R. 557; Commonwealth of Virginia Department of Taxation v. Blanks Oil Co. (1998) 255 Va. 242, 498 S. E. 2d 914; New England Yacht Sales, Inc. v. Commissioner of Revenue Services (1986) 198 Conn. 624, 504 A. 2d 506; Department of Revenue, Commonwealth of Kentucky v. Cox Machinery Co. (1982) 650 S.W. 2d 261; In Re Pacific Express, Inc. (1986) 780 F. 2d 1482 (California); Fuchs Agency Inc. v. Wisconsin Department of Revenue (1979) 91 Wis.2d 283, 282 N. W. 2d 6.

[7] See Virginia v. Blanks Oil Co. (1998) 255 VA. 242 (Tax Statute fixing place of business as place of sale for local tax purposes prevailed over argument based on commercial law that sale occurred on delivery.)

The difficulty of determining the proper aggregate tax rate is not a Bradley-Burns issue, because that rate has always been uniform from county to county and for cities within the counties, whether the applicable tax is use or sales tax. In either event, it cannot exceed 1 ¼ percent (or 1 percent under the triple flip in which ¼ was traded for property tax revenues to be distributed later.) Any rate problem can arise only under the Transactions Tax system imposed by Part 1.6 of the Revenue and Taxation Code, not 1.5, the Bradley-Burns tax which permits uniform rates only.

That system has produced a variety of rates in districts throughout California under the California Constitution which permits new taxes to be adopted by counties, cities and districts only after an affirmative vote of the people has occurred. In addition, the limits on the actual rate can vary from district to district which does make for less uniformity.

To the extent this problem exists today, sourcing both the Bradley-Burns and the District taxes on a destination basis is incorrect if the Bradley-Burns sales tax applies even if the purchaser takes delivery outside the jurisdiction where negotiation occurred. Under current law, if the sales tax applies, and the retailer has nexus in the Transactions Tax District, it will be required to collect and remit the District tax, while it may also be required to allocate Bradley-Burns sales tax to the jurisdiction where the sale was negotiated. The extent to which this problem would be increased by the proposed regulations is marginal, since the pooled revenues affected are expected not to exceed approximately 5 percent of the aggregate pooled annual revenues of approximately $ 500 MM, and many of the sales in question may not involve the sourcing issue.

11. Direct Impact on Local Jurisdictions

a. Use tax direct payment permits.

Although it is correct that Use Tax Direct Payment Permits will no longer be usable by local jurisdictions to allocate the local one percent tax from the subject transactions to the place of first use, such permits are not now applicable to sales tax transactions. To the extent local jurisdictions or taxpayers are concerned about this change, they may purchase directly from out-of-state retailers rather than locally, in which event the local use tax would still apply and be subject to the exemption and self-reporting alternative if there is no local participation in the delivery. Alternatively, they could purchase from a location in their city

and receive the resulting sales tax revenues automatically without having to resort to a use tax exemption certificate.

b. Budgetary Concerns.

MSLLC acknowledges that local jurisdiction budgetary concerns must be taken into account in the transition to imposing Bradley-Burns sales tax on the subject transactions. Liberal mitigation rules must be provided to bridge the transition, and Board Staff and the claiming jurisdictions should cooperate to establish accurate estimates of the effects that can be anticipated both retroactively and prospectively.

Board Staff has the best records to carry this work out, and approximately a year ago MSLLC was informed by the Appeals Division that the necessary information would be developed by the Sales and Use Tax Department. That work has still not been accomplished because of illness in the Department, but it should now be reassigned for priority completion during the month of April and well in time for inclusion in the Department's final Discussion Paper for consideration by interested parties and Board Members during May and prior to the May 21, 2007 issuance of the Final Discussion Paper as indicated on page 17 of the Second Discussion Paper. If the 1996 estimate cannot be refreshed and brought current in time for careful verification and review prior to the May 31 Business Taxes Committee meeting, MSLLC requests that meeting be limited to considering the regulation clarifications and final disposition of the Cities of Los Angeles and San Jose appeal.

c. Mass Appeal

The Board Staff's estimate of 1350 pending claims under the Mass Appeal is overstated by approximately 400 claims. Probably this has occurred as a result of double-counting some appeals that were filed prior to 1995 and then recounting the same appeals when they were refiled in late 1995 in preparation for the proposed settlement of the issue that was never completed. The precise number of claims is less important, however, than determining the revenues that could be affected from the correction process.

The internal study done by Staff in 1996 appears to be flawed in its attempt to determine the "winners and the losers" from correction and the data on which it is based and all the assumptions supporting it have never been revealed publicly. Nor has that study ever been represented as being statistically sound. Therefore, that study should not be regarded as authoritative in establishing the list of "winners and losers" as

provided as Exhibit 7 to the Second Discussion Paper. That cannot be responsible prediction.

12. Allocation Group and LRAU Staff Costs.

MSLLC questions the estimate of 1250 new inquiries per annum on this issue once the regulations have been clarified. Awaiting some experience before budgeting for such an increase in total workload would appear prudent. ALSO, MOST OF THE NEW INQUIRIES OF THIS NATURE WILL NO LONGER REQUIRE THE ENDLESS FACTUAL INVESTIGATIONS AND RESULTING INACCURACIES FOR UNINVESTIGATED TYPES OF CONTRACTS OF THE SAME TAXPAYER THAT EXISTS UNDER THE CURRENT FACTS AND CIRCUMSTANCES POLICY. Even if a number of new submissions were to materialize, the time required to investigate each should be radically reduced.

The Correction Process

Near the close of the Second Interested Party Meeting, Board Staff urged that the supporters of the clarifications to Regulations 1802 (a) (3) and1803 include in this submission a description of how the existing 900-odd pending inquiries should be corrected once the revisions are adopted. We were surprised by that suggestion because it had not occurred to us that the substantive issues addressed in the regulations process would be affected by the amount of corrections required. In the past, almost all distribution corrections have been handled routinely by Board Staff, based on the best information available, without substantial in-put from MSLLC and, over almost thirty years, no continuing disagreements over amounts.

Approximately a year ago, the Legal Department and the Allocation Group of the Refund Section had indicated that, with rehearing under consideration in Cities of Los Angeles and San Jose, the Sales and Use Tax Department would be required to produce a study of the revenue impacts of correction of the Mass Appeals, and MSLLC offered to cooperate in that process. This work has still not been done, however.

Nevertheless, MSLLC intends to cooperate fully with Staff's request, because correction is vital to the integrity of the entire Bradley-Burns allocation system and needs to be addressed comprehensively in these cases in order to avoid unintended consequences. However, any such advice or assistance MSLLC provides to Board Staff should be understood only as its attempt to comply with this request for assistance from Staff, and not as a fixed position or offer, either by MSLLC or any local jurisdiction, whether a "winner" or a "loser".

MSLLC believes that the re-distributions required in this situation can be made if the concerned local and state agencies recognize the need for reasonable flexibility in approaching and solving the problem of how to provide redress for thirty-five years of illegal distributions.

There are many facts unknown to both MSLLC and the claiming cities that must be gathered and weighed before any kind of understanding can be reached as to how the corrections should be managed. MSLLC is committed to negotiating a reasonable correction process with Board Staff to establish a practical approach that will recommend itself for consideration by affected jurisdictions.

MSLLC approaches the necessary corrections in this matter with great care, because the breadth of the company's clientele will result in some suffering negative consequences from the corrections, though in relatively small amounts, as well as those that may benefit. This distinguishes MSLLC from other consultants or the internal staffs of local jurisdictions that chose not to file any claims relating to this issue, even after the dispute became public in 1996. Therefore, MSLLC must take as objective a position as possible on corrections, because that is what our clients expect and deserve. In this, Board Staff may discern a common interest with that of MSLLC.

In the cases under consideration, our position is based on the original Bradley-Burns statute and how it was interpreted in the contemporaneous 1956 regulations until 1971. That is the objective reality we respect. We are also mindful that Board Members are provided a degree of discretion under RTC Section 7209 in making corrections, and we suggest that it would be wise to consider maximum reasonable mitigation to jurisdictions that would experience budgetary hardship as a result of the final corrections ordered.

We counsel that the impact of any such hardship might be controlled by stretching out any net redistribution charge from a jurisdiction over a period of at least 12 calendar quarters. The charge for any quarter should not exceed a ceiling of five percent of the average total pool amount for the preceding 12 quarters, plus 100 percent of the growth above that average for the current quarter. If the ceiling or cap became effective, corrections would continue to be made from the jurisdiction's pool until the jurisdiction's net redistribution charge was exhausted.

In order to begin the correction process, we have contacted Board Staff to request a meeting to address the following matters:

1. Agreement that purpose of meeting is to work-out an overall reasonable plan to resolve the Mass Appeal Claims. MSLLC proposes that the objectives of the plan be to establish, based on the best historical and statistical information available:

    a. A gross estimated correction amount for each claim;

b. An estimated "pool adjustment" amount for each claim to reflect any revenues originally distributed to the claimant with respect to transactions reflected in such claim;

c. The amount determined by deducting the b. amount (estimated "pool adjustment") from the gross estimated correction in a, to be distributed to the claiming jurisdiction as the "estimated net correction;"

d. A method for charging the estimated net correction to the pools of other counties..

2. Standardization of lists of Mass Appeal claims for comparison purposes.

3. Provision of all work-papers and audit assumptions and criteria used by Board Staff in compiling the 1996 estimate of audited and unaudited gross and net corrections that would be required for the 895 claims reviewed at that time.

4. Provision of all available pool, payment and file data relating to each Mass Appeal claim.

5. Development of a work-plan for Board Staff to review all outstanding claims involving this issue for approximately 100 taxpayer places of business that remain open and provide tentative actual net correction amounts and pool charges.

6. Development of a joint work-plan for reviewing and quantifying net corrections and charges with respect to retailers no longer located in the claiming jurisdiction.

We look forward to completing this process as rapidly as possible so that it may be carried out and managed objectively and professionally.

Yours very truly

Albin C. Koch/ct

Albin C. Koch
Special Tax Counsel
MuniServices LLC

CC: All Board Members and Staff
Randy Dryden
Janis Varney
Fran Mancia

Exhibits

A-1. 1956 version of present Regulation 1802, originally numbered as Regulation 2202.

A-2. 1956 version of present Regulation 1803, originally numbered as Regulation 2203.

A-3. 1956 version of present Regulation 1620, originally numbered as Regulation 2015.

A-4. 1961 version of present Regulation 1628, originally numbered as Regulation 2028.

A-5. 1965 version of present Regulation 1628, originally numbered as Regulation 2028.

A-6. 1971 version of present Regulation 1628.

A-7. December 19, 1970 version of present Regulation 1620, as renumbered and revised from Regulation 2015.

A-8. January 31, 1970 version of present Regulation 1803 as renumbered and revised from Regulation 2203.

A-9. January 31, 1970 version of present Regulation 1802 as renumbered and revised from Regulation 2202.

B-1. 1955 Bulletin issued by the League of California Cities.

B-2. 1955 Bulletin issued by the County Supervisors Association of California ("CSAC").

C. Legislative History of RTC Section 6010.5 (AB 1086, 1965)

C-1. Memorandum dated June 9, 1965 from H.F. Freeman, Executive Secretary of the State Board of Equalization, to Mr. Frank Mesple, Legislative Secretary, Revenue and Management Agency.

C-2. Letter dated June 10, 1965 from Senator Alfred E. Alquist to Governor Edmound G. Brown.

C-3. Memorandum dated July 8, 1965 from Mr. Frank Mesple, Legislative Secretary, to Governor Edmound G. Brown.

D. Proposed clarifying amendments to Regulation 1803 (a) and (b) and 1802 (a) (3).

* * * *

EXHIBIT A-1

TUESDAY, MARCH 27

The Board met at its offices at 1020 N Street, Sacramento, in special meeting at 2:00 P.M. pursuant to the call of the Chairman, Mr. Leake. There were also present Mr. Quinn and Mr. Kirkwood.

The Chairman explained that this meeting had been called for the purpose of considering a report from the staff with respect to a series of conferences had with representatives of the Attorney General, the League of California Cities, the County Supervisors Association, and the California Retailers Association, concerning the interpretation to be given to Section 7205 of the Revenue and Taxation Code.

In addition to the Secretary of the Board there were also in attendance Assistant Attorney General Irving Perluss, the Assistant Sales Tax Administrator, W. T. Denny, and the Sales Tax Counsel, Edward H. Stetson.

During the course of the discussion that ensued, the Secretary brought to the attention of the Board communications just received from the League of California Cities, the County Supervisors Association of California, and the California Retailers Association, all pertaining to the subject under consideration.

It was explained to the Board by the Secretary that at a conference held with representatives of these organizations on March 26, 1956 in the Sacramento offices of the Board, the text of a proposed Ruling 2202 with respect to "Place of Sale for Purposes of Local Sales and Use Tax" was discussed; that other participants in this discussion were Assistant Attorney General Sabine, Assistant Attorney General Perluss, and Deputy Attorney General Goodman. At that conference Mr. Harry L. Say, State Sales Tax Administrator, was present, as well as members of the staff in attendance at this meeting of the Board.

The Secretary informed the Board that Ruling 2202 now proposed for Board adoption is the same Ruling that is mentioned in each of the three communications heretofore described. At the suggestion of Assistant Attorney General Perluss, these communications are hereby set forth in these minutes as follows:

(1) From the League of California Cities, 321 Hotel Senator, Sacramento, California:

"March 27, 1956

"Mr. Dixwell L. Pierce
Executive Secretary
State Board of Equalization
1020 N Street
Sacramento, California

"Dear Mr. Pierce:

"Will you please advise the members of the State Board of Equalization that the League of California Cities respectfully urges the Board to adopt proposed Ruling 2202, relative to the place of sale for purposes of local sales and use taxes. As one of the three proponents of the Bradley-Burns uniform local sales and use tax law, we can state without qualification that it was our intent that the presumption contained in Section 7205 was intended to be a substantive provision and was intended to be conclusive and not rebuttable. Stated another way, if for any reason the Board does not adopt a ruling which has the effect of treating the presumption as conclusive, then we would urge the Board to announce that the Bradley-Burns law cannot be administered by the State Board of Equalization.

"Treating the presumption in Section 7205 of the Revenue and Taxation Code as conclusive will come as no surprise to the members of the Legislature or to the opponents of the legislation because in every appearance before committees of the Legislature, as well as in the explanation of the proposed law on the floor of the Senate and the Assembly, it was clearly stated that for the purposes of the act receipts from sales made by retailers whose place of business was located within a city would go to the city unless under the credit provisions the city willingly had levied at a rate of less than 1%.

"We hope that the ruling will be adopted immediately, so that the act can be administered in accordance with the intent of the proponents of the legislation.

"Very sincerely,

"Richard Carpenter
Executive Director
and General Counsel."

(2) From the County Supervisors Association of California, 500 Elks Building, Sacramento 14:

"March 27, 1956

"The Honorable State
Board of Equalization
1020 N Street
Sacramento, California

"Gentlemen:

"The proposed rule determining place of sale for purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law, as prepared by your staff, is consistent with our understanding of the intent of the law.

"We recommend and urge this proposed rule for your adoption.

"Very truly yours,

"William R. MacDougall
General Manager"

(3) From the California Retailers Association, Eleventh & L Building, Sacramento:

"March 26, 1956

"State Board of Equalization
State of California
1020 N Street
Sacramento, California

"Attention: Dixwell L. Pierce, Secretary

"Gentlemen:

"Pursuant to the meeting in your office today which was attended by Mr. Adrian Kragen on our behalf, we are writing to inform you that it was the intent of the California Retailers Association in the sponsoring of Chapter 1311, Statues of 1955, that the presumption in Section 7205, Revenue and Taxation Code, should be a conclusive presumption.

"We respectfully request that you adopt a rule which will implement this intent so that the uniformity of application of the tax, which was the basic purpose of the measure, shall be achieved.

"Very truly yours,

"Vincent D. Kennedy
Managing Director"

Commenting upon these communications as well as what was said by representatives of the groups sponsoring the Bradley-Burns Uniform Local Sales and Use Tax Law, of which Section 7205 is a part, Assistant Attorney General Perluss advised the Board that it would be appropriate for the Members to adopt the proposed Ruling 2202 to the effect that Section 7205 establishes a conclusive presumption that all retail sales occur at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-State destination, or to a common carrier for delivery to an out-of-State destination. Mr. Perluss also assured the Board that the advice thus given orally would be forthwith confirmed in a letter from his office, which is hereby incorporated in these minutes by reference.

After considering the recommendations of the staff and the advice of the Attorney General, and good cause appearing, upon motion of Mr. Kirkwood, seconded by Mr. Quinn, and unanimously carried (Mr. Reilly and Mr. McDavid absent), the following Ruling is adopted:

RULING NO. 2202. Place of Sale for Purposes of Local Sales and Use Tax

Reference: Section 7205

For the purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law, all retail sales occur at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-State destination, or to a common carrier for delivery to an out-of-State destination.

It is immaterial that title to the tangible personal property sold passes to the purchaser at a place outside of the local taxing jurisdiction in which the retailer's place of business is located, or that the property sold is never within the local taxing jurisdiction in which the retailer's place of business is located.

As provided in the law, the gross receipts from sales of tangible personal property subject to the local tax shall include delivery charges, when such charges are subject to the State sales or use tax.

If a seller has more than one location for which sellers' permits are required, and if two or more of such locations participate in the sale, the sale occurs at the place of business where the principal negotiations are carried on. If this place is the place where the order is taken, it is immaterial,

that the order must be forwarded for acceptance, approval of credit, shipment, or billing. For the purposes of this rule, an employee's activities will be attributed to the place of business out of which he works.

By the same motion and same vote, the Board made the following finding of fact constituting an emergency under which Ruling 2202 is to become effective April 1, 1956:

WHEREAS the Bradley-Burns Uniform Local Sales and Use Tax Law, Part 1.5, Division 2, of the Revenue and Taxation Code, becomes operative April 1, 1956; and

WHEREAS a number of counties and cities have adopted sales and use tax ordinances in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law, which ordinances become operative April 1, 1956, the Board finds that this ruling, relating to the place of sale, is necessary for the immediate preservation of the general welfare, and that notice and public procedure thereon are impractical, unnecessary, and contrary to the public interest.

The special session of the Board was thereupon adjourned at 3:15 P.M.

ATTEST:

SECRETARY

Form 400

FACE SHEET
FOR FILING ADMINISTRATIVE REGULATIONS
WITH THE SECRETARY OF STATE
(Pursuant to Government Code Section 11380.1)

ENDORSED
APPROVED FOR FILING
(GOV. CODE 11380.1)
MAR 27 1956
Division of Administrative Procedure

DO NOT WRITE IN THIS SPACE

Copy below is hereby certified to be a true and correct copy of regulations adopted, or amended, or an order of repeal by:

STATE BOARD OF EQUALIZATION
(Agency)

Dated: March 27, 1956

By: DIXWELL L. PIERCE

SECRETARY
(Title)

FILED
In the Office of the Secretary of State
of the State of California

MAR 28 1956

At 11:00 o'clock A M.

FRANK M. JORDAN, Secretary of State

By [illegible]
Assistant Secretary of State

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STATE OF CALIFORNIA

BOARD OF EQUALIZATION

SALES AND USE TAX RULES AND REGULATIONS

Ruling No. 2202. Place of Sale for Purposes of Local Sales and Use Tax.

References: Section 7205.

For the purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law, all retail sales occur at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-State destination, or to a common carrier for delivery to an out-of-State destination.

It is immaterial that title to the tangible personal property sold passes to the purchaser at a place outside of the local taxing jurisdiction in which the retailer's place of business is located, or that the property sold is never within the local taxing jurisdiction in which the retailer's place of business is located.

As provided in the Law, the gross receipts from sales of tangible personal property subject to the local tax shall include delivery charges, when such charges are subject to the State sales or use tax.

If a seller has more than one location for which sellers' permits are required, and if two or more of such locations participate in the sale, the sale occurs at the place of business where the principal negotiations are carried on. If this place is the place where the order is taken, it is immaterial that the order must be forwarded for acceptance, approval of credit, shipment, or billing. For the purposes of this rule, an employee's activities will be attributed to the place of business out of which he works.

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LEGISLATIVE COUNSEL 5

FINDING OF FACT CONSTITUTING EMERGENCY

RE: LOCAL SALES AND USE TAX RULE 2202

WHEREAS the Bradley-Burns Uniform Local Sales and Use Tax Law, Part 1.5, Division 2, of the Revenue and Taxation Code, becomes operative April 1, 1956 and,

WHEREAS a number of counties and cities have adopted sales and use tax ordinances in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law, which ordinances become operative April 1, 1956, the Board finds that this ruling, relating to the place of sale, is necessary for the immediate preservation of the general welfare and that notice and public procedure thereon are impractical, unnecessary and contrary to the public interest.

The said regulation is therefore adopted as an emergency regulation to take effect immediately upon filing with the Secretary of State as provided in Section 11422(c) of the Government Code.

STATE BOARD OF EQUALIZATION

March 27, 1956
Date

Dixwell L. Pierce
Secretary

EXHIBIT A-2

2203. Sales Tax and Use Tax—When Applicable—Collection of Use Tax by Retailers. (a) In any case in which state sales tax is applicable under the provisions of Ruling 55 (Cal. Adm. Code Sec. 2105), state-administered local sales tax is also applicable, if the place of sale as defined in Ruling 2202 is in a county having a state-administered local tax, or is in a city within such a county. In any case in which state sales tax is inapplicable under Ruling 55, state-administered local sales tax is also inapplicable. Thus, if title to the property sold passes to the purchaser at a point outside this State, state-administered local sales tax does not apply regardless of participation in the transaction by a California retailer.

(b) State-administered local use tax applies if the purchase is made from a retailer on or after the effective date of the local taxing ordinance and the property is purchased for use in a jurisdiction having a state-administered local tax and is actually used there, provided any one of the following conditions exists:

(1) Title to the property purchased passes to the purchaser at a point outside this State;

(2) The place of sale as defined in Ruling 2202 is in this State but not in a jurisdiction having a state-administered local tax;

(3) The place of sale as defined in Ruling 2202 is in a jurisdiction having a state-administered local tax and there is an exemption of the sale of the property from the sales tax but there is no exemption of the use of the property from the use tax;

(4) The property is purchased under a valid resale certificate.

State-administered local use tax does not apply to the storing, keeping, retaining, processing, fabricating or manufacturing of tangible personal property for subsequent use solely outside the county.

(c) Every retailer of tangible personal property subject to state-administered local use tax, who maintains a place of business in a taxing county, is required to collect the tax from the purchaser, and make returns and payments of the tax to the board. A retailer who does not maintain a place of business in the county imposing the tax is not required to collect the local use tax, even though he maintains a place of business in this State and is, therefore, required to collect the state use tax.

Any retailer holding a certificate of authority to collect state use tax, or maintaining a place of business in this State and holding a seller's permit, may apply to this board for authorization to collect state-administered local use tax. Forms upon which to apply will be furnished upon request. Authorization to collect local use tax will be

of the amount of the tax with his combined state and local sales and use tax return for the reporting period in which storage or use of the property became subject to the tax.

NOTE: Authority cited for Sections 2203 through 2206: Sections 7202, 7203 and 7205, Revenue and Taxation Code.

History: 1. New Sections 2203 through 2206 filed 5-3-56 as emergencies; effective upon filing (Register 56, No. 8).
2. Amendment filed 7-25-56 as an emergency; effective upon filing (Register 56, No. 14).

2204. Lease Contracts. A person who purchases tangible personal property (1) outside this State, (2) in a county without a state-administered local tax, or (3) under a resale certificate, and places the property in rental service in a jurisdiction having a state-administered local use tax, is liable for that tax. The lessor is deemed to be the user of property rented to others, and the use of the property arising under a rental agreement is the delivery of the property to the lessee.

As in the case of the state tax, the lessor may elect to use his rental receipts as the measure of the tax, in lieu of the sales price of the property to him. If he so elects, he is entitled to purchase the property under a resale certificate, even though at the time of purchase he intends to place the property in rental service.

2205. Public Utilities, Common Carriers, and Waterborne Vessels.

Part I. Public Utilities. Neither state-administered use tax of a city or county applies to the storage or use of tangible personal property if *all four* of the following conditions exist:

(a) The purchaser is a public utility within the meaning of the Public Utilities Code;

(b) The purchaser is regulated by the Public Utilities Commission of the State of California;

(c) The property is directly used in the transportation of persons or property, in the transmission of communications, in the generation, transmission or distribution of electricity, or in the manufacture, transmission or distribution of gas; and

(d) The property is used exclusively in operations to which all of the first three conditions apply.

The first condition is not fulfilled by, among others, radial highway common carriers, household goods carriers, and city carriers, as those terms are used in the Public Utilities Code.

The second condition is not fulfilled by, among others, organizations which are regulated by the Interstate Commerce Commission, the Federal Communications Commission, or the Federal Power Commission and not also regulated by the California Public Utilities Commission and organizations which are publicly owned, such as city electric systems and city transportation systems.

REVISION RECORD FOR REGISTER 56, No. 14

(July 28, 1956)

TITLE 21. PUBLIC WORKS

CHAPTER 1. DEPARTMENT OF PUBLIC WORKS

SUBCHAPTER 2. DIVISION OF HIGHWAYS

This part of Register 56, No. 14, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from July 14, 1956, to and including July 28, 1956.

It is important that the holders of the above-entitled portion of the code check the section numbers listed below as well as the page numbers when inserting this material in the code and removing the superseded material. In case of doubt rely upon the section numbers rather than the page numbers since the section numbers must run consecutively even though there may be an error in the paging.

SECTION CHANGES

Unless otherwise noted, the sections listed below are amended herein.

Section	Section
1413 added	1415 added
1414 added	1416 added

PAGE CHANGES

REMOVE Old Pages	INSERT Attached Pages
143 through 144.2	143 through 144.2

Do Not Throw Away Superseded Material. Save it and place it in a separate file under the original heading (either the appropriate title or register heading). It will then always be possible to find the prior wording of any section by using the history notes provided.

NOTE: This revision sheet is not a part of the code and should not be inserted therein. It is chiefly for filing purposes. If preserved with the removed pages, it will afford a ready reference to the sections affected by agency action.

EXHIBIT A-3

FACE SHEET
FOR FILING ADMINISTRATIVE REGULATIONS
WITH THE SECRETARY OF STATE
(Pursuant to Government Code Section 11380.1)

RECEIVED FOR FILING
SEP 19 1955
Division of Administrative Procedure

Copy below is hereby certified to be a true and correct copy of regulations adopted, or amended, or an order of repeal by:
State Board of Equalization
(Agency)
Dated: September 19, 1955
By: [signature]
SECRETARY
(Title)

FILED
In the Office of the Secretary of State of the State of California
SEP 20 1955
At 11:45 o'clock A M.
FRANK M. JORDAN, Secretary of State
By [signature]
Assistant Secretary of State

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STATE OF CALIFORNIA

BOARD OF EQUALIZATION

SALES AND USE TAX RULES AND REGULATIONS

Ruling No. 55. Interstate and Foreign Commerce*

References: Sections 6008, 6009.1, 6352, 6385

A. SALES TAX

1. Exempt Transactions

Sales tax does not apply to sales of property which is:

(a) Shipped from a point outside this State

(1) directly to the customer in this State, pursuant to an order sent by the customer directly to the seller at a point outside this State, or

(2) directly to the customer in this State, pursuant to an order taken in this State by an agent of the seller, or

(3) to the seller's agent in this State, pursuant to the contract of sale, for delivery by the agent to the purchaser in this State,

there being no participation whatever in any of the foregoing transactions by the seller's branch office or other place of business in this State or by an agent of the seller having any connection with any branch office or other place of business of the seller in this State.

(b) Imported into this State from a foreign country and sold by the importer in the original package in which imported.

(c) Shipped to a point outside this State, pursuant to the contract of sale, by delivery by the retailer to such point by means of

(1) facilities operated by the retailer

(2) delivery by the retailer to a carrier for shipment to a consignee at such point, or

(3) delivery by the retailer to a customs broker or forwarding agent for shipment outside this State.

DO NOT WRITE IN THIS SPACE

Ruling No. 55. Interstate and Foreign Commerce (Continued

References: Sections 6008, 6009.1, 6352, 6385

(d) Sold to a common carrier and shipped by the retailer via the purchasing carrier under a bill of lading whether the freight is paid in advance, or the shipment is made freight charges collect, to a point outside this State and actually transported to the out-of-state destination for use by the carrier in the conduct of its business as a common carrier (effective July 1, 1943).

(e) Sold to a foreign purchaser for shipment abroad and delivered to a ship, airplane, or other conveyance furnished by the purchaser for the purpose of carrying the property abroad and actually carried to a foreign destination, title and control of the property passing to the foreign purchaser upon delivery, and no portion of the property being used or consumed in the United States.

(f) Purchased for use solely outside this State and delivered to a forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation, and actually delivered to a port outside the continental limits of the United States prior to making any use thereof.

Bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside the State must be retained by the retailer to support deductions taken under (c) and (d) above. Copies of U. S. Customs shippers' export declarations filed with the Collector of Customs or other documentary evidence of export must be obtained and retained by retailers to support deductions taken under (e) above. Tax applies to the transaction if the property is diverted in transit or for any reason not actually delivered outside the State pursuant to the contract of sale or not shipped abroad by a foreign purchaser, regardless of documentary evidence held by the retailer of delivery of the property to a carrier for shipment outside the State, or to a foreign purchaser for shipment abroad.

2. Taxable Transactions

Sales tax applies to sales of property which is:

(a) Shipped from a point outside this State to the purchaser in this State in a transaction in which

(1) the seller's branch office or other place of business in this State is utilized in any way, as in receiving the order or distributing the goods, or

(2) the order for the goods is given in this State to an agent connected with a branch office or other place of business of the seller in this State, or

(3) the order for the goods is given in this State to an agent of an out-of-state seller, the contract of sale not requiring, however, that the order be filled by shipment from a point outside this State.

Ruling No. 55. Interstate and Foreign Commerce (continued)

(b) Property for defense purposes delivered to officers of the United States.

Tax does not apply to sales of tangible personal property shipped to a point outside this State pursuant to the contract of sale when the property is marked for export and delivered by the retailer to the "contracting officer", "officer in charge", "port quartermaster", or other officer of the United States for transportation and delivery to the purchaser at such a point.

(c) Airplanes delivered to agencies of the United States.

Tax does not apply to sales of airplanes and parts and equipment for airplanes transported to a point outside this State pursuant to the contract of sale when such property is delivered to the United States Air Force or any other agency or instrumentality of the United States for transportation and delivery to the purchaser or someone designated by him at that point.

(d) Steamships plying on the high seas.

Sales tax applies to sales to operators of steamships of tangible personal property such as fuel oil and ships' supplies, irrespective of the fact that the property will be consumed on the high seas or outside the territorial limits of this State. Tax does not apply to sales of tangible personal property purchased for resale on board ship through the ship's commissary or otherwise.

B. USE TAX

Use tax applies with respect to any tangible personal property purchased for storage, use or other consumption in this State the sale of which is exempt from sales tax under this ruling, except property held or stored in this State for sale in the regular course of business or subsequent use solely outside this State, and except property purchased for use in interstate or foreign commerce, placed in use in interstate or foreign commerce prior to its entry into this State, and thereafter used continuously in interstate or foreign commerce (effective July 1, 1935).

"Storage" and "use" do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State (effective September 9, 1953).

Effective as to sales tax, except as otherwise indicated, August 1, 1933.

Effective as to use tax, as indicated above.

(Amended August 19, 1953.)

*Title 18, Ruling 2051, California Administrative Code.

In adopting said regulation without notice and public procedure said Board made a finding that the adoption of said regulation is necessary for the immediate preservation of the general welfare and that notice and public procedure thereon [illegible] unnecessary and contrary to the public interest

FINDING OF FACT CONSTITUTING EMERGENCY

RE: SALES AND USE TAX RULINGS 12, 53, and 55

WHEREAS, the 1955 Regular Session of the Legislature adopted Sections 6007.5 and 6387 and amended Sections 6007.5, 6363, and 6364 of the Sales and Use Tax Law, effective September 7, 1955, which new sections and amendments require that Sales and Use Tax Rulings 12, (Ruling 1922, Cal. Adm. Code), 53 (Ruling 2003, Cal. Adm. Code), and 55 (Ruling 2015, Cal. Adm. Code) be amended in conformity therewith, the Board finds that the amendment of these rulings, in order that they shall conform to the statute, is necessary for the immediate preservation of the general welfare, and that notice and public procedure thereon are impracticable, unnecessary, and contrary to the public interest.

The said regulation is therefore adopted as an emergency regulation to take effect immediately upon filing with the Secretary of State as provided in Section 11422(c) of the Government Code.

Sept. 19, 1955
Date

STATE BOARD OF EQUALIZATION

Dixwell L. Pierce
Secretary

contract of sale, by delivery by the retailer to such point by means of

(1) facilities operated by the retailer

(2) delivery by the retailer to a carrier for shipment to a consignee at such point, or

(3) delivery by the retailer to a customs broker or forwarding agent for shipment outside this State.

EXHIBIT A-4

Gross receipts subject to sales tax and the sales price subject to use tax include the amount of any manufacturer's or importer's excise tax included in the prices of the property sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether or not the amount of such tax is stated as a separate charge.

Effective July 1, 1943. Adopted as of January 1, 1945, as a restatement of previous rulings.

(Sections 6011, 6012, Revenue and Taxation Code)

Article 9. Matters Relating to Transportation of Property

2028. Delivery Charges. (a) **General.** The application of tax to delivery charges is determined by the point at which title to the property passes to the buyer. *Charges for transporting the property to the point where the buyer takes title are part of taxable gross receipts or sales price.*

Charges for transporting property from the point at which the buyer takes title to some other point are not taxable provided a separate charge is made for such transportation, not exceeding the amount paid to a carrier, or a reasonable amount for delivery by the seller's own facilities.

(b) **Delivery by Seller's Facilities.** When a seller, by means of facilities operated by him, delivers tangible personal property to a place specified by the purchaser, title will not be considered as passing to the purchaser until the goods reach the place specified, in the absence of clear and convincing evidence that both retailer and buyer intended that title should pass at some other place. Oral declarations of the parties after the transaction is completed are of little value as evidence, because of their self-serving nature. The intention of the parties to transfer title to the buyer prior to delivery to him should be clearly expressed in writing constituting a part of the contract of sale, entered into by both parties *prior* to the transportation for which the charge in question takes place.

(c) **Delivery by Carrier.** Whether title passes to the buyer upon delivery to a carrier depends upon the intention of the parties, as expressed in the contract of sale, in the conduct of the parties, usages of trade and the circumstances of the case. An express agreement of the parties that title passes when the goods are delivered to the carrier is sufficient to establish that title passed at the point agreed upon. If there is nothing in the orders, acceptances, or other documents making up the contract of sale expressly declaring the intention of the parties in respect of the passage of title, other evidence may be resorted to for the purpose of explaining the intention of the parties. Such evidence includes conversations between and declarations of the parties during the negotiations before the execution of the contract, and a construction given the contract by the acts and conduct of the parties with knowledge of its terms before any controversy has arisen as to its meaning. Consideration may also be given to the rule for ascertaining

the intention of the parties as expressed in Section 1739 of the Civil Code, Rule 5, which reads:

> "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

When goods have been delivered by carrier, some retailers, without regard to passage of title, have assumed that separate charges made for transportation are not taxable. The tax must be paid, however, with respect to all charges for transporting the property to the point where title passes to the buyer. Because of the confusion that has existed in this regard, and the difficulty of ascertaining the intent of the parties regarding the passage of title in transactions long past, doubts on the question of where title passed will be resolved in favor of retailers prior to July 1, 1961. There can be no such doubt, however, when the contract of sale makes it clear that title is not to pass until the goods are delivered to the purchaser. An example of such a contract would be one specifying "f.o.b. destination", or its equivalent.

On and after July 1, 1961, unless there is a written agreement to the contrary, it will be assumed that title to the goods passes from seller to buyer upon receipt by the buyer, rather than upon receipt by the carrier.

NOTE: Authority originally cited: Sections 6011 and 6012, Revenue and Taxation Code. Additional authority cited: Section 7051, Revenue and Taxation Code.

History: 1. Amendment filed 6-8-61; effective thirtieth day thereafter (Register 61, No. 11).

2029. Goods Damaged in Transit. (a) **Sales Tax:** If damage to goods in transit to the consumer occurs after the "sale" as defined in Section 6006 of the Revenue and Taxation Code, is made, sales tax applies to the sale. If the damage occurs prior thereto, sales tax applies as follows:

(1) If the goods are destroyed, tax does not apply to damages paid the retailer for their destruction.

(2) If the goods are not destroyed, and are sold at retail in their damaged condition, tax applies to that portion of the total amount paid to the retailer representing the fair retail value of the goods in their damaged condition.

EXHIBIT A-5

payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment."

Gross receipts subject to sales tax and the sales price subject to use tax include the amount of any manufacturers' or importers' excise tax included in the prices of the property sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether or not the amount of such tax is stated as a separate charge.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6011 and 6012, Revenue and Taxation Code.

History: 1. Amendment filed 9-24-64; effective thirtieth day thereafter (Register 64, No. 14).

Article 9. Matters Relating to Transportation of Property

*2028. **Delivery Charges.** (a) **Delivery by Carrier.** Tax does not apply to separately stated charges for transportation of property from the retailer's place of business or other point from which shipment is made directly to a place specified by the purchaser, provided the transportation is by other than facilities of the retailer, i.e., independent contract or common carrier, United States mail. The place where title passes to the customer is immaterial, except when the property is sold for a delivered price, as explained in (c) below. The charges may not, however, exceed the cost to the retailer of the transportation. Any amount billed to the customer in excess of such cost cannot be excluded from the measure of the tax as a delivery charge.

(b) **Delivery by Facilities of the Retailer.** Tax applies to charges for transportation of property to the purchaser by facilities of the retailer unless the transportation occurs after title to the property has passed to the purchaser; the charges are separately stated, and are for transportation from the retailer's place of business or other point from which shipment is made directly to a place specified by the purchaser. The amount that may be excluded from the measure of the tax cannot exceed a reasonable charge for the transportation.

(c) **Property Sold for a Delivered Price.** When property is sold for a delivered price, charges for transportation of the property to the purchaser are taxable unless the transportation occurs after title to the property has passed to the purchaser; the charges are separately stated, and are for transportation from the retailer's place of business or other point from which shipment is made directly to a place specified by the purchaser. The amount excluded from the measure of the tax may not, however, exceed the cost of the transportation, or a reasonable charge therefor if the retailer's facilities are used to make the delivery.

(d) **Determination of Place of Passage of Title.** When a retailer, by means of facilities operated by him, delivers tangible personal property to a place specified by the purchaser, or the property is sold for a delivered price, title will not be considered as passing to the purchaser until the goods reach the place specified in the absence of clear and convincing evidence that both retailer and buyer intended

* (Ed. Note—Ruling No. 58.)

that title should pass at some other place. Oral declarations of the parties after the transaction is completed are of little value as evidence because of their self-serving nature. The intention of the parties to transfer title to the buyer prior to delivery to him should be clearly expressed in writing constituting a part of the contract of sale entered into by both parties *prior* to the transportation for which the charge in question takes place. However, at no time will title transfer at a place where the goods are not physically located.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6010.5, 6011, 6012, Revenue and Taxation Code.

History: 1. Amendment filed 9-2-65 as an emergency; designated effective 9-17-65 (Register 65, No. 16). For prior history, see Register 62, No. 17.

2029. **Goods Damaged in Transit.** (a) **Sales Tax:** If damage to goods in transit to the consumer occurs after the "sale" as defined in Section 6006 of the Revenue and Taxation Code, is made, sales tax applies to the sale. If the damage occurs prior thereto, sales tax applies as follows:

(1) If the goods are destroyed, tax does not apply to damages paid the retailer for their destruction.

(2) If the goods are not destroyed, and are sold at retail in their damaged condition, tax applies to that portion of the total amount paid to the retailer representing the fair retail value of the goods in their damaged condition.

EXHIBIT A-6

Article 12. Matters Involving Transportation of Property.

1628. Transportation Charges. (a) **Transportation by Carrier.** In the case of a sale, whether by lease or otherwise, tax does not apply to "separately stated" charges for transportation of property from the retailer's place of business or other point from which shipment is made "directly to the purchaser," provided the transportation is by other than facilities of the retailer, i.e., by United States mail, independent contract or common carrier. Property will not be considered delivered "directly to the purchaser" if it is shipped to the retailer, his agent, representative or anyone else acting in the retailer's behalf. The place where the sale occurs, i.e., title passes to the customer or the lease begins, is immaterial, except when the property is sold for a delivered price or the transportation is by facilities of the retailer, as explained in (b) below. The amount of transportation charges excluded from the measure of tax shall not exceed the cost of the transportation to the retailer.

Transportation charges will be regarded as "separately stated" only if they are separately set forth in the contract for sale or in a document reflecting that contract, issued contemporaneously with the sale, such as the retailer's invoice. The fact that the transportation charges can be computed from the information contained on the face of the invoice or other document will not suffice as a separate statement. If a separately stated charge is made designated "postage and handling" only that portion of the charge which represents actual postage may be excluded from the measure of tax.

(b) **Transportation by Retailer's Facilities or Property Sold for Delivered Price.**

(1) **Definition.** "Delivered Price." Property is sold for a delivered price when the price agreed upon in the contract for sale includes whatever cost or charge may be made for transportation of the property directly to the purchaser. A sale for a "guaranteed price" including a separately stated amount for transportation is a sale for a "delivered price." Property is not sold for a delivered price when the price is agreed upon and to this price is added a separately stated amount representing the cost or charge for transportation of the property directly to the purchaser and any increase or decrease in the actual cost of transportation is borne by or credited to the purchaser.

(2) **In General.** When transportation is by facilities of the retailer or the property is sold for a delivered price, tax applies to charges for transportation to the purchaser, unless (a) the transportation charges are separately stated, (b) are for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, and (c) the transportation occurs after the sale of the

property is made to the purchaser. When the sale occurs before the transportation to the purchaser commences, the tax does not apply to separately stated charges for the transportation. The amount that may be excluded from the measure of the tax cannot exceed a reasonable charge for transportation by facilities of the retailer or the cost of transportation by other than facilities of the retailer.

(3) **Determination of When Sale Occurs.**

(A) **Security Agreements.** When a sale is made pursuant to a security agreement in which the retailer retains the title as security for the payment of the price, the sale occurs when possession of the property is transferred by the retailer to the purchaser or other person at the purchaser's direction.

(B) **Leases.** When the sale is by lease, the sale occurs upon the transfer of possession or granting of the right of possession of the property by the lessor to the lessee or other person at his direction.

(C) **Sale on Approval.** When the sale is on approval, the sale does not occur until the purchaser accepts the property.

(D) **Other Sales.** Unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to the physical delivery of the property, even though a document of title is to be delivered at a different time or place. If the contract requires or authorizes the retailer to send the property to the purchaser but does not require him to deliver it at destination, the retailer completes his performance with reference to the physical delivery of the property at the time and place of shipment; but if the contract requires delivery at destination, including cases where one of the terms of the contract is F.O.B. the place of destination, the retailer completes his performance with reference to the physical delivery of the property on tender there.

(4) **Place of Sale.** For the purposes of the state Sales and Use Tax Law (but not for the purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law nor for the purposes of the Transactions and Use Tax Law) the place of the sale or purchase of tangible personal property is the place where the property is physically located at the time the act constituting the sale or purchase takes place.

APPENDIX

(a) **Examples of Contract for Delivered Price.**

(1) The contract for sale provides for the sale of property for $100 per unit delivered to the purchaser.

(2) The contract for sale provides for the sale of property for $100 per unit "which includes cost of delivery at $10 per unit."

(3) The contract for sale provides for the sale of property for $100 per unit delivered, freight prepaid.

(4) The contract for sale provides for the sale of property for $100 per unit freight collect and allowed.

(5) The contract for sale calls for the sale of property for a guaranteed price of $100 consisting of $90 plus $10 freight.

(b) **Examples of Contracts Which Are Not for a Delivered Price.**

(1) The contract for sale provides for the sale of property for $100 per unit freight collect.

(2) The contract for sale provides for the sale of property for $100 per unit actual freight prepaid and added to the sales price.

(c) **Examples of Application of Tax.** All deliveries are by independent carrier.

All billings are in accordance with the terms of the contract.

(1) The contract for sale provides for the sale of property for $100 per unit delivered to the purchaser with freight prepaid.

Tax applies to sales price of $100 per unit with no deduction for freight charge since the freight charges are not separately stated. The contract is for a delivered price and requires delivery to the purchaser. Title does not pass to the purchaser prior to delivery.

(2) Contract for sale provides for the sale of property for $100 per unit. The retailer is required to ship the property to the purchaser freight collect.

Tax applies to $100 per unit since the responsibility for the the payment of the freight is upon the purchaser, and the seller makes no charge for freight. Since the carrier will bill the purchaser for the actual freight charge, there will be a separate statement of the freight. The property is not sold for a delivered price.

(3) The contract for sale provides for the sale of property for $100 per unit freight collect and allowed.

Tax applies to $100 per unit because the sale is for a delivered price and there is no showing that title passed prior to the transportation. If the contract for sale explicitly provided for the passage of title upon delivery to the carrier, or, in the absence of some other indication of when title was

to pass, provided that the shipment was made F.O.B. point of shipment, or required the retailer to ship the property to the purchaser, then the measure of tax would be $100 per unit less the amount of the freight paid to the carrier and shown on the payment voucher sent to the retailer by the purchaser.

(4) The contract for sale provides for the sale of property for $100 per unit plus actual freight of $10 per unit. Any increase or decrease in the freight is for the account of the buyer.

Tax applies to $100 per unit since the contract is not for a delivered price and shipment is by independent carrier.

(5) The contract for sale provides for the sale of property for $100 plus freight of $10, and the seller guarantees the price will not exceeed $110.

Tax applies to $110 since the sale is for a delivered price and there is no showing that title passed to the buyer before delivery at destination. If the contract for sale explicitly provided for the passage of title upon delivery to the carrier, or, in the absence of some other indication of when title was to pass, provided that the shipment was made F.O.B. point of shipment, or required the retailer to ship the property to the purchaser, then the measure of tax would be $110 per unit less the amount of any separately stated freight charge paid to the carrier.

(6) The contract for sale provides for the sale of property for $100 per unit freight equalized with x city. The invoice shows 10 units at $100 per unit, $1,000, freight from x city $100, total $1,100.

Under these circumstances, tax applies to $1,000 since the only separate statement of freight is the freight equalized with x city in the amount of $100. If the actual freight paid to the carrier for the transportation of the property from the retailer's place of business or other point from which shipment is made directly to the purchaser is less than $100, the exclusion will be limited to the amount paid to the carrier.

(7) Assuming the same facts as above, except the invoice shows 10 units at $100 per unit, $1,000, freight equalized with x city $100, total $1,100. The invoice also shows the notation, "Actual freight prepaid from point of shipment to destination is $200."

The sale is not for a delivered price. On the basis of the above billing, a separate statement of freight is made in the amount of $200. Accordingly, the measure of tax is $1,100 minus $200, or $900.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6010, 6010.5, 6011, Revenue and Taxation Code.

History: 1. Renumbering from Section 2028 filed 11-3-71; effective thirtieth day thereafter (Register 71, No. 45). For prior history see Register 65, No. 29.
2. Amendment filed 11-16-71; effective thirtieth day thereafter (Register 71, No. 47).

1629. Goods Damaged in Transit. (a) **Sales Tax.** If damage to goods in transit to the consumer occurs after the "sale" as defined in section 6006 of the Revenue and Taxation Code is made, sales tax applies to the sale. If the damage occurs prior thereto, sales tax applies as follows:

(1) If the goods are destroyed, tax does not apply to damages paid the retailer for their destruction.

(2) If the goods are not destroyed, and are sold at retail in their damaged condition, tax applies to that portion of the total amount paid to the retailer representing the fair retail value of the goods in their damaged condition.

(b) **Use Tax.** Use tax does not apply with respect to goods destroyed before the purchaser makes any storage or use of the goods. If the goods are damaged but are nevertheless stored or used by the purchaser, tax applies to that portion of the total amount paid to the retailer representing the fair retail value of the goods in their damaged condition.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006, 6010, Revenue and Taxation Code.

History: 1. Renumbering of former Section 2029 filed 3-7-69; effective thirtieth day thereafter (Register 69, No. 32).

1630. Packers, Loaders, and Shippers. (a) **In General—Definitions.** Packers, loaders, and shippers (hereinafter collectively called "shippers") purchase tangible personal property to be used in conditioning the goods to be shipped and to preserve, protect, and contain the goods during transportation. Such property includes, but is not limited to, the following:

(1) **Property Used to Condition the Goods for Shipment or to Preserve and Protect the Goods During Shipment.**

bracing materials
car strips
cleaning compounds
degreasing compounds
derusting compounds
dunnage or "loose" lumber (except as otherwise specified in (2) below)
gas (including dispensers)
ice and dry ice
miscellaneous preservatives
rust preventing compounds
salt
solvents
tarpaulin (weather protection)

EXHIBIT A-7

REVISION RECORD FOR REGISTER 70, NO. 51
(December 19, 1970)

TITLE 18. PUBLIC REVENUES

CHAPTER 1. STATE BOARD OF EQUALIZATION—PROPERTY TAX

CHAPTER 2. STATE BOARD OF EQUALIZATION—BUSINESS TAXES

This part of Register 70, No. 51, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from December 12, 1970, to and including December 19, 1970. The latest prior Register containing regulations of the above agency was Register 70, No. 46 (11-14-70).

It is important that the holders of the above-entitled portion of the code check the section numbers listed below as well as the page numbers when inserting this material in the code and removing the superseded material. In case of doubt, rely upon the section numbers rather than the page numbers since the section numbers must run consecutively even though there may be an error in the paging.

SECTION CHANGES

Unless otherwise noted, the sections listed below are amended herein.

Section
1042(a)(2)
1101
1137
1301
1318
1319
1324 Added
1325 Repealed
1331.1
1403.5
1413
1415.5 Added
1426
1598 Added
1620 Renumbered from 2015 and amended
1661
1823.5 Added
2015 Renumbered to 1620

(Precedes page 201, Title 18)

(over)

(d) **Refunds of Federal Taxes.**

(1) **Repayment by Manufacturer to Retailer.** When a manufacturer receives a refund of federal excise tax and repays the amount of the tax to the retailer pursuant to requirements of federal law, the repayment to the retailer will be regarded for sales and use tax purposes as a reduction of the retailer's cost of goods sold.

(2) **Repayment to Consumer.** When a manufacturer receives a refund of federal manufacturers' excise tax and repays the amount of the tax to the consumer either directly or through the retailer pursuant to requirements of federal law, the repayment to the consumer will be regarded for sales and use tax purposes as a price adjustment. Taxable gross receipts of the retailer for the period in which the repayment is made to the consumer will be reduced accordingly, and sales tax previously paid by the retailer on the amount will be refunded to the retailer, provided he also repays to the consumer the amount collected from him as sales tax reimbursement.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6011, 6012, Revenue and Taxation Code.

History: 1. Amendment and renumbering of former Section 2017 filed 8-7-69; effective thirtieth day thereafter (Register 69, No. 32).

Article 11. Interstate and Foreign Commerce

1620. Interstate and Foreign Commerce. (a) **Sales Tax.**

(1) **In General.** When a sale occurs in this state, the sales tax, if otherwise applicable, is not rendered inapplicable solely because the sale follows a movement of the property into this state from a point beyond its borders, or precedes a movement of the property from within this state to a point outside its borders. Such movements prevent application of the tax only when conditions exist under which the taxing of the sale, or the gross receipts derived therefrom, is prohibited by the United States Constitution or there exists a statutory exemption. If title to the property sold passes to the purchaser at a point outside this state, or if for any other reason the sale occurs outside this state, the sales tax does not apply, regardless of the extent of the retailer's participation in California in relation to the transaction. The retailer has the burden of proving facts establishing his right to exemption.

(2) **Sales Following Movement of Property Into State From Point Outside State.**

(A) **From Other States—When Sales Tax Applies.** Sales tax applies when the order for the property is sent by the purchaser to, or delivery of the property is made by, any local branch, office, outlet or other place of business of the retailer in this state, or agent or representative operating out of or having any connection with, such local branch, office, outlet or other place of business and the sale occurs in this state. The term "other place of business" as used herein includes the homes of district managers, service representatives, and other resident employees, who perform substantial services in relation to the retailer's functions in the state, particularly in relation to sales. It is immaterial that the contract of sale requires or contemplates that the goods will be shipped to the purchaser from a point outside the state. Participation in the transaction in any way by the local office, branch, outlet or other place of business is sufficient to sustain the tax.

(B) **From Other States—When Sales Tax Does Not Apply.** Sales tax does not apply when the order is sent by the purchaser directly to the retailer at a point outside this state, or to an agent of the retailer in this state, and the property is shipped to the purchaser, pursuant to the contract of sale, from a point outside this state directly to the purchaser in this state, or to the retailer's agent in this state for delivery to the purchaser in this state, provided there is no participation whatever in the transaction by any local branch, office, outlet or other place of business of the retailer or by any agent of the retailer having any connection with such branch, office, outlet, or place of business.

(C) **Imports.** Sales tax does not apply to sales of property imported into this state and sold by the importer or his agent in the original and unbroken package or container in which imported. "Original Package" means the unit transported by the shipper and delivered in the exact condition in which it was shipped. The container ceases to be original when broken for sale of its smaller units. The purchaser, however, is liable for use tax as explained in (b)(2) below, and the retailer is required to collect the use tax to the same extent as in any other situation in which the sales tax is inapplicable under this regulation.

If the property is sold by other than the importer or his agent, if it has been taken out of the original package or container in which it was imported, if it has been put to the use or stored in readiness for the use for which it was imported, or if it has been processed or handled within this state in any way following importation, the sale is not exempt as a sale of an import.

(3) **Sales Preceding Movement of Goods From Within State to Points Outside State.**

(A) **To Other States—When Sales Tax Applies.** Except as otherwise provided in (B) below, sales tax applies when the property is delivered to the purchaser or his representative in this state, whether or not the dis-

closed or undisclosed intention of the purchaser is to transport the property to a point outside this state, and whether or not the property is actually so transported. It is immaterial that the contract of sale may have called for the shipment by the retailer of the property to a point outside this state, or that the property was made to specifications for out-of-state jobs, that prices were quoted including transportation charges to out-of-state points, or that the goods are delivered to the purchaser in this state via a route a portion of which is outside this state. Regardless of the documentary evidence held by the retailer (see (3)(D) below) to show delivery of the property was made to a carrier for shipment to a point outside the state, tax will apply if the property is diverted in transit to the purchaser or his representative in this state, or for any other reason it is not delivered outside this state.

(B) **Shipments Outside the State—When Sales Tax Does Not Apply.** Sales tax does not apply when the property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of:

1. Facilities operated by the retailer or

2. Delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point. As used herein the term "carrier" means a person or firm regularly engaged in the business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers. The term "forwarding agent" means a person or firm regularly engaged in the business of preparing property for shipment or arranging for its shipment. An individual or firm not otherwise so engaged does not become a "carrier" or "forwarding agent" within the meaning of this regulation simply by being designated by a purchaser to receive and ship goods to a point outside this state. (This subsection is effective on and after September 19, 1970, with respect to deliveries in California to carriers, etc., hired by the purchasers for shipment to points outside this state that are not in another state or foreign country, e.g., to points in the Pacific Ocean.)

(C) **Exports.**

1. **In General.** Sales tax does not apply when the property is sold to a purchaser for shipment [illegible]

(b) A carrier, forwarding agent, export packer, customs broker, or other person engaged in the business of preparing property for export, or arranging for their export, or

(c) A ship, airplane, or other conveyance furnished by the purchaser for the purpose of carrying the property in a continuous journey to the foreign country, title to and control of the property passing to the purchaser upon delivery.

2. **Foreign Destination and Delivery Essential.** To be exempt as an export the property sold must be intended for a destination in a foreign country and actually delivered to the foreign country prior to making any use thereof. Sales of property such as fuel oil and other items consumed during a voyage to a foreign country are not exempt even though they are transported out of, and are not returned to this country. It is likewise immaterial that the ships to which the property is delivered are of foreign registry.

(D) **Proof of Exemption.** Bills of lading or other documentary evidence of the delivery of the property to a carrier, customs broker, or forwarding agent for shipment outside this state must be retained by the retailer to support deductions taken under (B) above. Copies of United States customs shippers' export declarations filed with the Collector of Customs or other documentary evidence of export must be obtained and retained by retailers to support deductions taken under (C) above.

(E) **Particular Applications.**

1. **Property Mailed to Persons in the Armed Forces.** Tax does not apply to sales of property which is mailed by the retailer, pursuant to the contract of sale, to persons in the armed forces at points outside the United States, notwithstanding the property is addressed in care of the postmaster at a point in this state and forwarded by him to the addressee.

When mail is addressed to Army Post Offices (A.P.O.'s) or to Fleet Post Offices (F.P.O.'s) in care of the postmaster, it will be presumed that it is forwarded outside California. The retailer must keep records showing the names and addresses as they appear on the mailed matter and should keep evidence that the mailing was done by him.

2. **Property for Defense Purposes Delivered to Offices of the United States.** Tax does not apply to [illegible]

erty is marked for export and delivered by retailer to the "contracting officer." "officer in charge." "port quartermaster," or other officer of the United States for transportation and delivery to the purchaser at such a point.

3. **Airplanes Delivered to Agencies of the United States.** Tax does not apply to sales of airplanes and parts and equipment for airplanes transported to a point outside this state pursuant to the contract of sale when such property is delivered to the United States Air Force or any other agency or instrumentality of the United States for transportation and delivery to the purchaser or someone designated by him at that point.

4. **Repairers.** When repairers of property in California, in fulfillment of their repair contracts with their customers, ship the repaired property to points outside this state by one of the methods set forth under (a)(3)(B) and (C) above, tax does not apply to the sale by the repairer of the repair parts and materials affixed to and becoming a component part of the repaired property so shipped.

(b) **Use Tax.**

(1) **In General.** Use tax applies with respect to any property purchased for storage, use or other consumption in this state the sale of which is exempt from sales tax under this regulation, except property held or stored in this state for sale in the regular course of business or subsequent use solely outside this state, and except property purchased for use in interstate or foreign commerce, placed in use in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce.

(2) **Imports.** Use tax applies with respect to property purchased abroad and imported into this state when the property is removed from the original package in which imported, or is put to use in this state by the importer. When property is sold by the importer in the original package so that sales tax is inapplicable under (a)(2)(C) above, the purchaser is liable for the use tax to the same extent as in the case of any other purchase of property for use in this state the sale of which is exempt from sales tax.

(3) **"Storage" and "Use"—Exclusions.** "Storage" and "use" do not include the keeping, retaining or exercising any right or power over property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated or manufactured, into, attached to, or incorporated into, other property to be transported outside the state and

thereafter used solely outside the state. The word "transported" means the article in question must be passively carried outside the state.

The following examples are illustrative of the meaning of the exclusion:

1. An engine installed in an aircraft which is flown directly out of the state for use solely thereafter outside the state does not qualify for the exclusion. The use of the engine in the transporting process causes the loss of the exemption.

2. An engine installed in a truck which is transported by rail or air directly out of the state for use thereafter solely outside the state qualifies for the exclusion.

3. An engine transported outside the state and installed on an aircraft which returns to the state does not qualify for the exclusion. It does not matter whether the use of the aircraft in California is exclusively interstate or intrastate commerce or both.

4. An engine transported outside the state and installed on an aircraft which does not return to the state qualifies for the exclusion.

(c) **Rail Freight Cars.** Sales tax does not apply to the sale of, and the use tax does not apply to the storage, use or other consumption in this state of rail freight cars for use in interstate or foreign commerce.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006, 6008, 6009.1, 6352, 6368.5, 6387, 6396, Revenue and Taxation Code.

History: 1. Renumbering from Section 2015 and amendment filed 12-16-70; effective thirtieth day thereafter (Register 70, No. 51).

1621. Sales to Common Carriers. (a) **Definition.** As used herein the term "common carrier" means any person who engages in the business of transporting persons or property for hire or compensation and who offers his services indiscriminately to the public or to some portion of the public. With respect to water transportation the term includes any vessel engaged, for compensation, in transporting persons or property in interstate or foreign commerce. This includes those vessels commonly called "ocean tramps," "trampers," or "tramp vessels."

(b) **Application of Tax.** The sale of tangible personal property to common carriers is exempt from sales tax when such property is:

(1) Shipped by the seller via the facilities of the purchasing carrier under a bill of lading, to an out-of-state point,

(2) Actually transported by the common carrier to the out-of-state destination, pursuant to the bill of lading, over a route the California portion of which is a route over which the purchasing carrier is authorized to transport cargo under common carrier rights,

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(4) Auctioneers. The place of sale by an auctioneer is the place at which the auction is held.

(5) Out-of-State Retailers Who Maintain a Stock of Tangible Personal Property in California. If an out-of-state retailer does not have a place of business in this state other than a stock of tangible personal property, the place of sale is the location of the stock of property from which delivery or shipment is made.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6015, 6018.6, 6359.4 and 7205, Revenue and Taxation Code. Auctioneers, see regulation 1565. Vending Machine Operators, see regulation 1574.

History: 1. Amendment and renumbering of former Section 2202 filed 1-26-70; effective thirtieth day thereafter (Register 70, No. 5).

1803. Application of Tax. (a) Sales Tax.

(1) In General. Except as stated below, in any case in which state sales tax is applicable, state-administered Bradley-Burns uniform local sales tax is also applicable, if the place of sale is in a county imposing a state-administered local tax. In any case in which state sales tax is inapplicable, state-administered local sales tax is also inapplicable. Thus, if title to the property sold passes to the purchaser at a point outside this state, state-administered local sales tax does not apply regardless of participation in the transaction by a California retailer. As explained in paragraphs (b) and (c), the use tax may apply. If so, the retailer is required to collect the use tax and pay it to the board.

Gross receipts from sales of tangible personal property subject to the local tax shall include delivery charges, when such charges are subject to the state sales or use tax.

(2) Exceptions.

(A) State-administered local sales tax does not apply to certain sales of tangible personal property to operators of common carriers and waterborne vessels for use principally outside the county of purchase.

(B) The partial exemption from state tax under section 6376 of the Revenue and Taxation Code with respect to certain fixed price construction contracts entered into before August 1, 1967, is not applicable to local sales or use tax.

(b) Use Tax. State-administered local use tax applies if the purchase is made from a retailer on or after the effective date of the local taxing ordinance and the property is purchased for use in a jurisdiction having a state-administered local tax and is actually used there, provided any one of the following conditions exist:

(1) Title to the property purchased passes to the purchaser at a point outside this state;

(3) The place of sale is in a jurisdiction having a state-administered local tax and there is an exemption of the sale of the property from the sales tax but there is no exemption of the use of the property from the use tax;

(4) The property is purchased under a valid resale certificate.

State-administered local use tax does not apply to the storing, keeping, retaining, processing, fabricating or manufacturing of tangible personal property for subsequent use solely outside the state or for subsequent use solely in a county not imposing a local use tax.

(c) Collection of Use Tax by Retailers. Retailers engaged in business in this state and making sales of tangible personal property, the storage, use or other consumption of which is subject to a state-administered local use tax, are required to collect the tax from the purchaser. It is immaterial that the retailer might not be engaged in business in the particular county or city in which the purchaser uses the property.

Retailers who are not engaged in business in this state may apply for a Certificate of Registration-Use Tax. Holders of such certificates are required to collect tax from purchasers, give receipts therefor, and pay tax to the board in the same manner as retailers engaged in business in this state.

As used in this regulation, the term "Certificate of Registration-Use Tax" shall include Certificate of Authority to Collect Use Tax issued prior to September 11, 1957.

(d) Leases. If a lease is a continuing sale, or a continuing purchase, for the purposes of state tax, it shall be a continuing sale, or a continuing purchase, for the purposes of local tax. If a lease is neither a continuing sale nor a continuing purchase for the purposes of state tax, it shall be neither a continuing sale nor a continuing purchase for the purposes of local tax.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6008, 6009.1, 6203, 6352, 6385, 7202, 7203 and 7205, Revenue and Taxation Code. Sales to Common Carriers, see regulation 1621, see Interstate and Foreign Commerce, regulation 2015 (unrevised series). Engaged in Business, see regulation 1683, see regulation 2083 (unrevised series). Common Carriers and Waterborne Vessels, see regulation 1805, Public Utilities, see regulation 1804.

History: 1. Amendment and renumbering of former Section 2203 filed 1-26-70; effective thirtieth day thereafter (Register 70, No. 5).

1804. Public Utilities. (a) General Rules. Neither the city nor county use tax applies to the storage or use of tangible personal property if all four of the following conditions exist:

(1) The purchaser is a public utility within the meaning of the Public Utilities Code;

(2) The purchaser is regulated by the Public Utilities Commission of the State of California, or, if not subject to regulation by that commission by reason of being engaged in

commission of the United States, and its activities are such that it would be regulated by the California Public Utilities Commission if its activities were wholly within the State of California;

(3) The property is directly used in the transportation of persons or property, in the transmission of communications, in the generation, transmission or distribution of electricity, or in the manufacture, transmission or distribution of gas; and

(4) The property is used exclusively in operations to which all of the first three conditions apply.

Condition (1) is not fulfilled by, among others, radial highway common carriers, household goods carriers, and city carriers, as those terms are used in the Public Utilities Code.

Condition (2) is not fulfilled by, among others, organizations which are publicly owned, such as city electric systems and city transportation systems.

Condition (3) is not fulfilled if the purchaser is engaged in the business of, among others, renting or loading railroad cars, operating a toll bridge, wharf, or warehouse, or selling water or heat and the property is used in any of those activities. Articles such as office and shop equipment and supplies are not used in a manner that fulfills the requirements of condition (3).

Condition (4) is not fulfilled if, for example, the purchaser is a highway carrier and uses the property both for common carriage, under a certificate of public convenience and necessity, and for contract carriage.

(b) **Leases.** The public utilities exemption is from use tax only. There is no comparable exemption from city or county sales tax. Accordingly, when property is leased to a public utility under a lease that is a continuing sale, sales tax applies to the gross receipts from the lease, unless otherwise exempt, during such period of time that the property is in a taxing jurisdiction.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 7202 and 7203, Revenue and Taxation Code. Forms of Exemption Certificates, see appendix to regulation 1805.

History: 1. New section filed 1-26-70; effective thirtieth day thereafter (Register 70, No. 5).

1805. Common Carriers and Waterborne Vessels. (a) **Definition —"Operators of Common Carriers."** As used herein, the term "operators of common carriers" means persons who engage in the business of transporting persons or property for hire or compensation and who offer their services indiscriminately to the public or to some portion of the public.

(b) **City Tax.** State-administered city sales tax does not apply to sales of tangible personal property to, and state-administered city use tax does not apply to the storage or use of tangible personal property by, operators of common carriers and waterborne vessels if the

property is to be used or consumed in the operation of such common carriers or waterborne vessels principally outside the city in which the sale or purchase is made. Such a sale, use or storage is, however, subject to county tax unless exempt under the next paragraph.

(c) **County Tax.** County sales tax does not apply to sales of tangible personal property to operators of common carriers and waterborne vessels to be used or consumed in the operation of such common carriers or waterborne vessels principally outside the county in which the sale is made. There is no comparable exemption from county use tax. Unless otherwise exempted, the use by the purchaser is subject to the county use tax and the retailer is required to collect the tax.

(d) **Conditions of Exemption.**

(1) **Exclusive Use of Property.** The exemption for operators of common carriers applies only if the property is used exclusively for common carrier operations. The exemption for operators of waterborne vessels applies only if the vessel is used exclusively for commercial purposes.

(2) **Direct Use of Property.** The exemption is limited to supplies and equipment used or consumed directly in the carriage of persons or property. It does not include office or shop equipment or supplies.

(e) **Leases.** If property is leased to an operator of a common carrier or waterborne vessel under a lease which is a continuing sale or a continuing purchase, unless otherwise exempted, either the use tax or sales tax applies to the gross receipts from the lease during such period of time that the property is in a taxing jurisdiction.

Appendix—Forms of Exemption Certificates for Claiming Exemption Under Regulations 1804, 1805, 1824 and 1825

(a) **Certificate Necessary to Support Exemption.** All purchasers of tangible personal property claiming exemption from Bradley-Burns local taxes under the provisions of regulations 1804 and 1805 or from both Bradley-Burns local taxes and district transactions (sales) and use taxes under regulations 1824 and 1825 should file with the seller an exemption certificate in one of the forms shown below, according to the circumstances.

(b) **Forms of Certificates.**

(1) **Common Carrier and Public Utility.** The following exemption certificate may be used by a purchaser claiming exemption from Bradley-Burns local tax and district transactions (sales) and use taxes as a common carrier and public utility under regulations 1804, 1805, 1824 and 1825:

"The purchaser hereby certifies that the purchaser is the operator of a common carrier and that the property purchased will be used (1) directly in the carriage of persons or property for hire, (2) exclusively for common carrier operations, and (3) principally outside

EXHIBIT A-9

due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the penalty provided by section 6511 or section 6591 for such failure.

Any person seeking to be relieved of the penalty shall file with the board a statement under penalty of perjury setting forth the facts upon which he bases his claim for relief. Section 6592, providing for the relief of certain penalties does not apply to the 6 percent penalty imposed for failure to make a timely prepayment nor to the 10 percent penalty imposed for failure to pay a determination within the time required by law.

(B) **Returns Due On and After November 8, 1967.** If the board finds that a person's failure to make a timely return, payment or prepayment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the penalty provided by sections 6476, 6477, 6511, and 6591 for such failure.

Any person seeking to be relieved of the penalty shall file with the board a statement under penalty of perjury setting forth the facts upon which he bases his claim for relief. Section 6592, providing for the relief of certain penalties does not apply to the 10 percent penalty imposed for failure to make a timely prepayment under section 6478 nor to the 10 percent penalty imposed for failure to pay a determination within the time required by law.

NOTE: Authority cited: Section 7051, Revenue and Taxation Code.

History: 1. Amendment and renumbering of Section 2103 filed 11-5-69; effective thirtieth day thereafter (Register 69, No. 45).

Article 19. Bradley-Burns Uniform Local Sales and Use Taxes

1802. Place of Sale for Purposes of Bradley-Burns Uniform Local Sales and Use Taxes. (a) **In General.**

(1) **Retailers Having One Place of Business.** For the purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law, if a retailer has only one place of business in this state, all California retail sales occur at that place of business unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination, or to a common carrier for delivery to an out-of-state destination.

(2) **Retailers Having More Than One Place of Business.** If a retailer has more than one place of business in this state which participate in the sale, the sale occurs at the place of

this place is the place where the order is taken, it is immaterial that the order must be forwarded elsewhere for acceptance, approval of credit, shipment, or billing. For the purposes of this regulation, an employee's activities will be attributed to the place of business out of which he works.

(3) **Place of Passage of Title Immaterial.** If title to the tangible personal property sold passes to the purchaser in California, it is immaterial that title passes to the purchaser at a place outside of the local taxing jurisdiction in which the retailer's place of business is located, or that the property sold is never within the local taxing jurisdiction in which the retailer's place of business is located.

(b) **Place of Sale in Specific Instances.**

(1) **Vending Machine Operators.** When sales of tangible personal property are made through a vending machine for more than 15 cents, the place of sale is the place at which the vending machine is located. If the property is dispensed through a vending machine for 15 cents or less, the operator is the consumer of such property. If the property dispensed for 15 cents or less is purchased under a resale certificate or from an out-of-state seller without payment of tax, the place at which the vending machine is located is the place at which the operator uses the property for purposes of the use tax.

(2) **Itinerant Merchants.** The place of sale with respect to sales made by sellers who have no permanent place of business and who sell from door to door for their own account shall be deemed to be in the county in which is located the seller's permanent address as shown on the seller's permit issued to him. If this address is in a county imposing sales and use taxes, sales tax applies with respect to all sales unless otherwise exempt. If this address is not in a county imposing sales and use taxes, he must collect the use tax with respect to property sold and delivered or shipped to customers located in a county imposing sales and use taxes.

(3) **Retailers Under Section 6015.** Persons regarded as retailers under the last paragraph of section 6015 are regarded as selling tangible personal property through salesmen, representatives, peddlers, canvassers or agents who operate under or obtain the property from them. The place of sale is the place from which the salesman, representative, peddler, canvasser or agent who makes the sale operates. If this place is in a county imposing sales and use taxes, sales tax applies with respect to all sales unless otherwise exempt. If this place is not in a county imposing sales and use taxes, the retailer must collect the use tax with respect to property sold and delivered or shipped to customers in a county imposing sales and use taxes.

EXHIBIT B-1

CALIFORNIA

HOTEL CLAREMONT
BERKELEY 5
THORNWALL 3-3083

1440 STATLER CENTER
LOS ANGELES 17
MICHIGAN 4934

League of California Cities

Member American Municipal Association "Western City" Official Publication

Berkeley, California
June 15, 1955

To: All City Officials.

Subject: Legislative Highlights.

GENERAL.

Prior to the effective date of non-urgency measures, September 7, 1955, the League will distribute to each city a legislative digest of all bills approved by the Legislature and the Governor. Bills not discussed in this bulletin will be included in the digest and will be referred to both at regional division meetings and at the Annual Conference. If you have questions concerning legislation, whether or not mentioned herein, please direct your questions to the League's Berkeley office. There is a wide variety of additional laws of direct interest to cities including civil defense test exercises and authority for general law cities to increase the tax rate for civil defense purposes, provision for bus turnouts on freeways, prohibition of crime comic books, a much more effective fireworks law, adoption of codes by reference, use of school safety patrols, etc. Space does not permit a discussion of all of these measures at this time.

Most of the measures which are discussed herein are awaiting the Governor's approval. You are urged to write requesting his signature on bills of interest to cities. Separate letters should be written with respect to each bill.

BRADLEY-BURNS UNIFORM LOCAL SALES AND USE TAX LAW — A.B. 3111.

A.B. 3111 certainly is the most important bill to the cities considered by the Legislature at the 1955 session. Its potential of an additional $82,000,000 annually to county and city government was used as an argument against the bill, but the members of the Legislature were persuaded that this additional amount of revenue could not help but reduce property taxes in many areas of the state where the property tax rate is excessive or has reached an all-time high.

A.B. 3111 is now before the Governor for his approval. The A.F. of L. and the C.I.O. have opposed this bill from the date of its introduction. They will continue to oppose the bill and will undoubtedly urge their entire membership to request the Governor's veto. The bill also was opposed by the California Farm Bureau Federation, the Agricultural Council and the California Manufacturers Association. These groups offered crippling amendments which were defeated and will urge the Governor to pocket veto the bill. It therefore becomes imperative that the Governor hear from the proponents of the measure immediately, urging his approval of A.B. 3111 which was sponsored by the Retailers Association, the Supervisors Association and the League. It is essential that you obtain the same outside support urging the Governor's approval that was solicited in requesting legislative approval. See our bulletin of April 1 for details.

LC16

A.B. 3111, the "Bradley-Burns Uniform Local Sales and Use Tax Law", permits any county to levy a county sales and use tax at a rate of 1% (no more and no less).

The proposed law provides that the county ordinance must contain provisions identical to the state sales and use tax act; no additional seller's permit is required; amendments to the state sales and use tax law automatically become a part of the local ordinance; the county must contract with the state for collection and administration of the local sales and use tax ordinance; and the ordinance must exempt sales of tangible personal property where another local sales and use tax has been levied. All retail sales are presumed to have been made at the location of the place of business of the retailer. Exemptions added to the proposal on May 28 are substantially similar to those now contained in local sales and use tax ordinances and provided for in Section 37101 of the Government Code authorizing general law cities to levy a use tax. One, the utility exemption, is an exemption solely from local use taxes and is included only for accounting purposes. It will be deleted whenever the state is completely blanketed by county sales and use tax ordinances. The utility purchasing any tangible personal property subject to a local sales tax will, of course, have to pay the sales tax. In addition, local ordinances must include an exemption from both the sales and use tax of the following: "Purchases of property by operators of common carrier and waterborne vessels to be used or consumed in the operation of such common carriers or waterborne vessels, principally outside a city, city and county or county . . ." The reason for this latter exemption is similar to the utility exemption, and when the state is blanketed by county sales and use tax ordinances, the League also will propose legislation to eliminate this exemption. The State Board of Equalization advised the Legislature prior to inclusion of such exemptions that both can be administered, and because similar exemptions are contained in city ordinances at the present time, the League did not object to their inclusion.

Under the provisions of the bill, the county ordinance must also contain a provision which entitles retailers located within cities to credit against the amount due the county the amount of sales tax due a city under a city sales tax ordinance. In order that the city retailer be entitled to such credit, the city ordinance must contain the same provisions noted above that must be included in the county ordinance. In addition, the city sales tax rate must be at the rate of 1% or less. In other words, if the city sales tax ordinance is at a rate of more than 1%, city retailers would not obtain the credit; and so, for practical purposes, if a county adopts its 1% ordinance, a city cannot go above 1% in the city ordinance because to do so would mean a 3% state sales tax within such city, a 1% county tax, and on top of both a 1½% or greater city sales tax which would mean a total of 5½% or more. We believe that this would be politically and practically impossible.

If the city levies at a rate of less than 1%, the difference between the city sales tax rate and 1% will go to the county because the retailer will be entitled only to credit in an amount equal to the city sales tax levy. This is important to note because it is in this area that there is room for negotiation between the county and the cities within the county as to what amount, if any, of the tax collected on sales within cities will go to county government. It should be remembered that, once the bill was made permissive as to all counties, all counties had the right either to enact or not to enact a local sales and use tax ordinance. Until the county does enact such an ordinance, the bill does not operate within that county either as to the county or the cities within that county. The city may not contract with the state under the bill until the county enacts its ordinance. The county ordinance may also include a provision which states that it shall become inoperative on the first day of the calendar quarter following an increase by any city within the county of its sales tax rate above the rate in effect at the time the county ordinance is enacted. While this is stated in the bill, the statement is no more than a recitation of what the county could have provided in its ordinance, notwithstanding the statement thereof in A.B. 3111. Thus, if a county agrees with

all of the cities within the county that the cities will levy at the rate of 9/10ths of 1%, the county may protect the agreement by including such a termination provision in the county ordinance. Several cities have indicated a willingness that a certain percentage less than 1% will be satisfactory to such cities. On the other hand, in counties like Los Angeles, with a heavy volume of retail business in the unincorporated area and where the county has by resolution indicated that it would be satisfied solely with the revenue derived from a 1% levy in the unincorporated territory, it is expected that all cities will levy the full 1% rate without objection from county government.

All sales and use taxes collected by the State Board of Equalization for counties and cities are to be transmitted monthly to such counties and cities. The cost of collection will be deducted.

If the Governor approves A.B. 3111, it will not become operative until April 1, 1956. No county will be able to enact a county ordinance until that date. Meanwhile, it is expected that representatives of the California Retailers Association, the Supervisors Association and the League will work out with officials of the State Board of Equalization uniform county and city sales tax ordinances and a form of contract to be entered into by counties and by cities with the State Board of Equalization. There undoubtedly will be many administrative problems to be worked out. Several cities have asked for copies of new ordinances to increase existing rates. All that is needed under such circumstances is an amendment of the existing ordinance section which established the tax rate.

We hope we have made it clear that there is nothing in this new law which makes it necessary for any city to either increase or decrease its local sales and use tax rate at the present time. There is nothing in the proposed law which requires any city not having a local sales and use tax ordinance to enact one at the present time. If any city wishes to enact a sales and use tax ordinance or wishes to increase an existing rate, it may, of course, do so. But there is nothing in A.B. 3111 which requires or even suggests such action. The decision to enact an ordinance or to increase an existing rate is one which should be made locally and without regard to the existence of A.B. 3111. As soon as it is known that the bill will become law, steps will be taken to enable all counties and cities to be prepared on its operative date--April 1, 1956--to take advantage of its provisions.

Labor representatives have argued that the bill should be defeated because the sales tax is a regressive tax falling most heavily upon those working men least able to afford the tax. An examination of the California sales tax and city sales taxes in this state indicates that the argument is wholly fallacious. The average working man spends most of his income for food, clothing and shelter. Food is exempt under California law, no sales tax is paid on rent or on shelter, utility bills are exempt from the sales tax, and only clothing or other commodities purchased for the home or for personal use are subject to sales taxes. In addition, approximately 80% of the retail sales in California are now subject to both state and city sales taxes, so the increase, if any, to the working man is going to be relatively small.

The members of the Legislature who voted for this program did so in the face of heavy opposition. We hope that each of you will make an effort to remember to express your gratitude to those legislators who helped the Retailers, the Supervisors Association and the League. Without their support and the teamwork and active support of the members of the three organizations, this bill would not have been enacted. Without the Governor's approval, all of this work will have been wasted.

EXHIBIT B-2

County Supervisors Association of California

500 ELKS BUILDING, SACRAMENTO 14, CALIFORNIA
TELEPHONE HUDSON 1-4011

September 16, 1955

To: Clerk of the Board of Supervisors
Administrative Officer
Auditor
District Attorney
County Counsel

From: Wm. R. MacDougall

Subject: COUNTY SALES TAX BULLETIN

The following sales tax bulletin is based upon and follows closely the excellent sales tax bulletin prepared by the League of California Cities under date of September 2, 1955. There are few differences between this bulletin and that of the League of Cities. Those differences consist of the omission of several items of purely municipal nature and the addition of several items of special interest to counties. Because a cooperative approach and a real understanding of the new sales tax law are the essentials to its success in actual operation, we have asked for and obtained the permission of the League of Cities to use and to modify their material. The Association deems this circumstance particularly fortunate since a unified approach to the basic fundamentals of the new law will reduce to a absolute minimum the areas of actual negotiation. At the moment, those areas appear to be two in number: One, negotiation by each county with the cities in its county as to the amount of sharing (if any) by the county of revenues from sales made within cities; and two, negotiations by the League of Cities and the Supervisors Association with appropriate state officials as to the charges to be made by the state for collections under contract.

SUMMARY AND GUIDE TO CONTENTS

I. County may, but need not, enact sales and use tax ordinance.

II. Rate of county ordinance must be exactly 1%.

III. County must give city retailers credit for amount city retailers owe city if city ordinance conforms to new law.

IV. Rate of city ordinance must be 1% or less.

V. Both county and city ordinances must contain uniform provisions.

VI. Both county and city must contract with state for administration and collection.

VII. Law does not become operative until April 1, 1956.

VIII. State transmits collections monthly and deducts cost of rendering service.

IX. Model ordinances and contracts due November 1955.

EXPLANATION OF ACT

I. County May Enact Sales and Use Tax Ordinance. The law authorizes counties to adopt a sales and use tax ordinance. No county is required to act. Until a county does enact such ordinance, no city within the county may take advantage of state collection of city sales and use taxes.

II. County Ordinance Must Contain Uniform Provisions. A county sales and use tax ordinance must be levied at the rate of 1% -- no more and no less.

The county ordinance must adopt by reference all of the present applicable provisions of the State Sales and Use Tax Law. The ordinance must also provide that all amendments to the State Law automatically become part of the ordinance.

The county must contract with the State Board of Equalization for performance by the State of all functions incident to the operation and administration of the county sales and use tax ordinance. This contract must be entered into before the effective date of the county ordinance. A county cannot establish a county collection and administration system either for itself or for cities within the county but must contract with the state.

The county ordinance must exempt sales subject to other county ordinances or sales subject to the ordinance of a city in any other county. This avoids duplicate local sales and use taxes on the same purchases. The county ordinance must also exempt from both the sales and use tax certain purchases by common carriers and from the use tax, storage and use of certain personal property used by utilities. These last two exemptions are currently found in city sales and use tax ordinances.

III. Credit Provision of County Ordinance Key to Complete Understanding of New Law. A most important provision, which must be included in the county ordinance, is one which entitles a retailer subject to a city sales and use tax to credit against the amount due under the county ordinance the full amount due under the ordinance of the city in which the retailer's place of business is located. If, for example, Los Angeles County adopts a county sales and use tax ordinance, the county levy of 1% will be applicable to all retail sales made within the county, including sales made by retailers located within cities. The mandatory credit provision means that all retailers located within any of the county's 46 cities will be able to credit against the amount they would otherwise owe the county under the county ordinance the amount they owe the city

within which they are located under the city sales and use tax. If the city sales and use tax ordinance provides a rate of 1%, the city retailer will be entitled to full credit and will owe nothing to the county under the county ordinance. What happens when the city rate is more or less than 1% is discussed in detail later in this bulletin.

This credit provision must be remembered because retailers located within a city will receive credit for the amount they would otherwise owe the county "only" if the city ordinance contains the required "uniform" provisions, including a rate of 1% or less.

IV. City Ordinance Also Must Contain Uniform Provisions.
If the city retailer is to be entitled to credit against the amount he owes the county the amount due under the city ordinance, the city ordinance must contain the same standard provisions discussed earlier in relation to the county ordinance. If the city ordinance does not conform, the retailer gets no credit and a tax would be owed by him to both the county and the city. Thus, a retailer located within a city having a city sales and use tax ordinance (nonconforming) would owe the city, the county and the state the combined sales and use taxes levied by each jurisdiction. In a city with a nonconforming ordinance, the county sales and use tax would be collected. Therefore, once the county acts by adopting a sales and use tax ordinance, it is vital that cities act concurrently to enact similar ordinances in order to make the credit provisions of the county ordinance effective. The city ordinance also must adopt by reference the provisions of the present State Sales and Use Tax and subsequent amendments to the law. The same exemptions included in the county ordinance must also be in the city ordinance.

V. City Rate 1% or Less.
The city ordinance may levy a sales and use tax at the rate of 1% or less. Assuming the city ordinance conforms in all other respects to state law, it must also fix the rate at 1% or less or the city retailer receives no credit. If the city rate is 1%, there will be full credit and the county receives nothing from retail sales made within the city. If the city rate is 3/4 of 1%, the retailer is entitled to credit that amount against the county 1% tax and the county would receive from sales made within such city 1/4 of 1%. The county will receive revenue only from the difference between an actual city sales and use tax rate of less than 1% and 1% whatever the difference, if any, may be.

If any city levies at a rate in excess of 1% (e.g., 1½%), the city retailer gets no credit against the amount due under the county ordinance and in this case there would be a 3% state sales and use tax, plus a 1% county tax, plus 1½% or higher city tax or a total state and local rate of 5½% or more. The effect of such action by a city appears to make it unlikely that any city actually will levy at a rate in excess of 1%!

No County-City Contracts - But There Must Be Agreement!
While there is therefore no contract between the city and the county within which the city is located for the county to receive some percentage of the city sales and use tax, the law contains a method by which counties can receive a portion of sales and use tax revenue from retail sales made within cities. If a city levies at any percentage less than 1%, the difference between the actual city rate and

1% goes to the county. What difference, if any, between the city rate and 1% will depend entirely on local circumstances and the ability of the county and city officials to come to some informal agreement. The League of California Cities has suggested that all cities within each county consider a joint policy prior to discussions with county officials. City officials have been told to (1) remember that no uniform program of state collection is possible until the county adopts an ordinance, (2) jointly discuss the problem with county officials and not allow the county to make separate informal agreements with individual cities, and (3) make certain that in case cities agree to levy at a rate of less than 1%, the "inside" amount to be received by the county should be expended on services provided by the county both within as well as outside of cities. The county will undoubtedly also set aside for such service a corresponding amount from the "outside" revenue, being equal to the same rate being applied to the "outside" sales tax revenue (e. g., if the county receives ¼% from the city, an amount equal to a ¼% rate applied to the unincorporated area receipts.) The remainder of the "outside" revenue (in this example, 3/4%) will in practice (though not in law) be subject to the principle that the area paying the tax should receive the benefits from it. In other words, in the example, 3/4 of the unincorporated area revenue will be spent there, for such things as secondary roads, added sheriff's services, parks and recreation.

If the cities do agree to levy at a rate less than 1%, the county can include in the county ordinance a provision that the county ordinance ceases to be operative when a city rate is increased. The effect of an increase in such case would be to require the city to return to locally collected and administered sales and use taxes. The Supervisors Association recommends that all counties include this provision in their ordinance.

VI. City Contract with State.
In order for the city retailer to be entitled to credit against the amount due the county the amount due under a city ordinance, the city must contract with the State Board of Equalization for performance by the Board of all functions incident to the administration and operation of the city sales and use tax ordinance. If the county adopts its ordinance, the city must as a practical matter turn its collection over to the state or city retailers receive no credit against the amount due under the county ordinance and the combined state, county and city rate again would be 5% or more.

The city must contract with the state prior to the effective date of the city ordinance. Again as a practical matter county and city ordinances, in those counties where the county intends to take advantage of the new law, will have to be adopted concurrently and contracts with the state also will have to be approved at the same time and prior to the effective date of the ordinance.

VII. Act Not Operative Until April 1, 1956.
Counties cannot adopt an operative ordinance or enter into a contract with the state until April 1, 1956. Counties have no authority under existing law and will have no taxing authority until April 1, 1956 under the new law. Counties may take every step necessary to be prepared to act effectively when vested with

authority and may presently indicate an intention to make an ordinance effective the day after the date of their contract with the state. Counties cannot, however, act by adopting an ordinance effective now or entering into a contract with the state effective on a date prior to April 1, 1956.

It is probably that counties can adopt an ordinance prior to April 1, 1956 to become operative on that date. The matter is now being thoroughly researched by our attorneys. There would seem to be no reason to adopt the ordinance before February 1956 or in any event until a satisfactory sharing ratio for "inside" collections has been worked out with the cities.

If cities act now for the first time to adopt a sales and use tax ordinance in order to obtain municipal revenue necessary for municipal purposes or if present city sales and use tax rates are increased now for the same purpose, this is a purely local decision unrelated to the new law. Official action under the new law for the purpose of achieving uniformity of local sales and use taxes cannot be made operative either by counties or cities until April 1, 1956.

VIII. Revenue Collected by State at Cost of Rendering Service.

The law provides that the State Board of Equalization shall transmit monthly to the county or city, as the case may be, all local sales and use taxes after deducting "such amount as will reimburse the board for the cost to it in rendering the services". While the language seems perfectly clear to us and we know what was intended, there is currently a difference of opinion between those who sponsored the act and those who will administer it. We contend that if it cost the state $5 million to administer the state act and $6 million to administer both the state act and the new law, counties and cities would share proportionately in relation to revenue the additional cost of $1 million. They contend (some of those who represent the state) that the state should collect 1/4 of the cost of overall administration from local governments participating in the program because local governments' 1% tax represents 1/4 of the combined rate of 4%. We think the language is clear but if there is a doubt it will have to be resolved at the highest state level before contracts are entered into between local governments and the state.

Retail Sales Presumed Made at Place of Business of Retailer

For the purpose of this law all retail sales are presumed to have been consummated at the place of business of the retailer. If the retailer has more than one place of business or is an out-of-state retailer, the place of sale is to be determined by board rule. This provision adequately covers the great bulk of retail sales and avoids the present local problem of exemption of sales for delivery outside the city. A number of very difficult administrative problems remain to be solved but they relate to only a small percentage of the total sales and use tax receipts. Some may require amendment of the new law at the Budget Session in March 1956. If required, they can be anticipated in the ordinance and contract and made effective April 1, 1956. It is expected that the contract, as was intended, can determine most of these administrative problems

The League of Cities and the Supervisors Association are now working jointly on model ordinances and model contracts with the State Board of Equalization. After state review and approval and any indicated revision, those will be supplied to all counties and cities. The League of Cities has appointed a special legal

committee to work on the project; the Supervisors Association has assigned the important task to its Legal Advisory Committee. An all-day meeting with state experts has already been held.

Because of the complicated drafting work which must be done, it was not possible for the Association to release its sales tax manual at its 1955 annual meeting in Monterey as was originally planned. The material making up the sales tax manual will include the model ordinance and model contract and statistical estimates--it will be released during November.

IX. SOME QUESTIONS AND ANSWERS

Q. Is the county required to adopt a county sales and use tax ordinance?
A. No, it may but need not adopt the ordinance.

Q. May the county levy at a rate of less than 1%.
A. No, the county rate must be exactly 1%.

Q. May the county collect its own sales and use tax?
A. No, it must contract with the state.

Q. If the county does not adopt a county ordinance, may the city contract directly with the State Board of Equalization?
A. No, the city may only contract with the state if the county within which the city is located adopts a sales and use tax ordinance.

Q. Does the city contract with the county?
A. No, only with the state.

Q. If the city decides to give the county a share of the city sales and use tax, does it enter into an agreement with the county?
A. No, the city simply establishes the rate of the city sales tax at less than 1% and the difference between the actual rate and 1% goes to the county because of the credit provision in the county ordinance.

Q. What is meant by "the credit provision"?
A. The county ordinance must give retailers located in cities having sales and use taxes an off-set or credit up to 1%. Thus, with the county rate of 1% and city rate of 1%, the city retailer owes nothing to the county, but if the city rate is 3/4 of 1%, the city retailer owes the county 1/4 of 1% on all retail sales.

Q. If Jones purchases a car in the city of Los Angeles and takes delivery in the unincorporated area of the county of Los Angeles and both local governments have a 1% sales and use tax, does Jones pay one or two local sales and use taxes?
A. He pays only one to the city of Los Angeles, because the presumption is that the sale was consummated at the place of business of the retailer and the credit provision in this case allows retailer to off-set full amount otherwise due under county ordinance.

Q. If Jones buys a car in the city of Los Angeles and takes delivery in Pasadena or Santa Ana, is more than one tax due?
A. No, because each city and county ordinance must exempt from its sales and use tax any sale subject to a sales and use tax of another city or county and again the presumption is that the sale was completed at the place of business of the retailer.

Q. Should a city act now in order to protect itself under the new law?
A. No, there is nothing the county can do to limit the amount of the city rate. However, the county may decide to enact no ordinance at all--and state collection will not be available to the cities in that county--and there will be no uniformity of sales taxes in that county.

Q. If the city rate is increased or an ordinance adopted for the first time after the county ordinance takes effect, does the county ordinance cease to be effective?
A. It may, but need not. If the county ordinance includes a provision that makes it inoperative if a city rate is increased, the effect is to leave the city exactly where it is today -- the city can collect and administer its own tax. If the county ordinance contains no such provision, cities may increase their rates up to 1% without affecting the operative effect of the county ordinance.

Q. Why should any city levy at a rate of less than 1%, thereby releasing to the county revenue which would otherwise go to the city?
A. Because the city in most cases can give the county a certain percentage and still receive more than it does under the present city sales and use tax ordinance at a 1% rate. This results from greater efficiency of state collection and elimination of leakage caused by local exemptions such as sales for delivery outside the city. In addition, some counties will have insufficient inducement to enact a county ordinance if they receive only revenue from sales made by retail outlets located in unincorporated territory. The volume of such sales in some cases is extremely low.

Q. How can reliable estimates be made of anticipated revenue?
A. The Research Division of the State Board of Equalization expects to have firm estimates based on a careful survey for release to cities and counties shortly after October 1, 1955. Each county will be supplied with several copies of these figures.

Q. When will model ordinances and contracts be available?
A. Sometime during November. With these documents and the State Board's estimates of revenue, counties and cities may then discuss with some degree of certainty proposed county and city action under the new law.

Wm. R. MacDougall

Wm. R. MacDougall
General Manager

WRM/r

EXHIBIT C-1

State of California

Board of Equalization

Memorandum

TO: Mr. Frank Mesplé, Legislative Secretary

FROM: H. F. Freeman, Executive Secretary

Bill No. AB 1086 Date Last Amended 6-9-65

Author: Alquist Related Bills

Bill Summary:

An act to add Sections 6010.5 and 6016.5 to the Revenue and Taxation Code, relating to sales and use taxes.

Analysis:

This measure defines the place of sale or purchase of tangible personal property as the place where the property is physically located at the time the act of sale or purchase takes place. It also excludes telephone, telegraph, and electrical lines and poles from the definition of tangible personal property, but the law as it existed prior to its effective date will determine the application of tax to property used for contracts validly entered into before the effective date of the act.

Department Position:

Support. This measure was suggested by the State Board of Equalization to make the application of the sales and use tax to installations of communication and power lines the same for contractors engaged in either government or private construction contracts.

Approval and Comments:

We respectfully request that the Governor approve this measure.

GA-1097-A (3-65)

Acting Executive Secretary
State Board of Equalization

5-20-65
Date

LEGISLATIVE INTENT SERVICE PE-3 800-666-1917

EXHIBIT C-2

STATE CAPITOL
SACRAMENTO 14, CALIFORNIA

DISTRICT OFFICE
777 NO. FIRST STREET
SAN JOSE 14, CALIFORNIA
TELEPHONE: 286-6510

Assembly
California Legislature

ALFRED E. ALQUIST
MEMBER OF ASSEMBLY, TWENTY-FOURTH DISTRICT

COMMITTEES
JOINT LEGISLATIVE BUDGET COMMITTEE
EDUCATION
MUNICIPAL AND COUNTY GOVERNMENT
NATURAL RESOURCES, PLANNING, AND PUBLIC WORKS
REVENUE AND TAXATION

1965 JUN 9 PM 2 40

June 10, 1965

Re: AB 1086

Honorable Edmund G. Brown
Governor
State Capitol
Sacramento, California

Dear Governor Brown:

Section 1 of AB 1086, now before you for signature, provides that for the purposes of the sales tax, the place of the sale is where the property is physically located. This is necessary because of a provision in the Commercial Code which provides that the place of sale can be where the documents of title are exchanged. The Commercial Code provision would allow avoidance of the sales tax on the sale of property physically located in California by exchanging documents of title outside of California.

Section 2 of the Bill provides that, for the purposes of the sales and use tax, telephone and other electrical transmission lines and their supporting poles, towers, and conduit will be considered real property. This provision will relieve a major administrative problem and allow the state to tax the cost of materials used in constructing transmission lines for the Federal government. At the same time it will relieve private and local government consumers of sales tax on the cost of fabricating these structures. The loss of revenue from private and local government consumers will be offset by taxes passed on to the Federal government.

Your favorable consideration of this Bill would be appreciated.

Respectfully,

A. E. Alquist

ALFRED E. ALQUIST

AEA/jw

LEGISLATIVE INTENT SERVICE
PE-2
800-666-1917

EXHIBIT C-3

State of California

Revenue and Management Agency

Memorandum

To : Honorable Edmund G. Brown
Governor of California

Attention: Mr. Frank Mesplé
Legislative Secretary

Date : July 8, 1965

File No.:

Watch for folder

From : Department of Finance --Office of the Director

Subject: AB 1086 (Alquist)

HISTORY, SPONSOR AND PURPOSE:

The first section of this bill defines the place of sale of an article to be its physical location at the time of sale. This amendment would maintain the status quo and prevent complications which might result from recent changes in the Uniform Commercial Code.

The two other sections declare prospectively that telephone and telegraph lines, electric transmission and distribution lines, poles, towers, or conduit are not tangible personal property and hence are to be treated as improvements to real property.

Under Section 105(a) of the Revenue and Taxation Code, telephone and telegraph lines are specifically excluded from the definition of "improvements" to real property and hence are considered as personal property for property tax purposes. The Attorney General has ruled that this definition also applies to the sales tax, and the ruling is broad enough to include transmission and distribution lines, poles, towers and conduit. This ruling has resulted in confusion and a different treatment between installations made for federal agencies and private utilities.

The bill is sponsored by the Board of Equalization.

FINANCIAL EFFECT AND COMMENT:

The sales tax on personal property, if applied to an item such as a transmission line, would apply to material and fabrication cost but not installation cost. The latter is extremely difficult to segregate from the entire job price. Moreover, the tax treats the utility as the consumer, and hence installations for the Federal Government would be tax exempt; installations for a private utility would be taxable.

The sales tax on real property, when applied to an item such as a transmission line, would apply only to material cost. In this case the contractor is the consumer, and the tax would be applicable whether the installation is for the Federal Government or private utility. This latter treatment, as proposed by this bill, would simplify the computation of tax liability and make all such transactions taxable.

The Board of Equalization has estimated that the revenue loss from elimination of fabrication costs would be more than offset by the taxation of installations for federal agencies.

RECOMMENDATION:

Approval is recommended.

for Hale Champion
Director of Finance

HC:jm
30156

EXHIBIT D

04/06/07

Proposed Amendments to Regulations 1802 and 1803

S. 1802. Place of Sale and Use for Purposes of Bradley-Burns Uniform Local Sales and Use Taxes.

(a) In General.

(1) Retailers Having One Place of Business. For the purposes of the Bradley-Burns Uniform Local Sales and Use Tax Law, if a retailer has only one place of business in this state, all California retail sales of that retailer in which that place of business participates occur at that place of business unless the tangible personal property sold is delivered by the retailer or his or her agent to an out-of-state destination, or to a common carrier for delivery to an out-of-state destination.

(2) Retailers Having More Than One Place of Business.

(A) If a retailer has more than one place of business in this state but only one place of business participates in the sale, the sale occurs at that place of business.

(B) If a retailer has more than one place of business in this state which participates in the sale, the sale occurs at the place of business where the principal negotiations are carried on. [__]

(3) Participation

Normally, the place of business where participation occurs is the place where the order is taken or the sale contract is negotiated, or, in the case of out-of-state orders or negotiations, the place of business in this state where shipment occurs. Where the principal negotiations occur in state, it is immaterial that the order must be forwarded elsewhere for acceptance, approval of credit, shipment, or billing. For the purposes of this regulation, an employee's activities will be attributed to the place of business out of which he or she works.

(4) Place of Passage of Title Immaterial. ~~If title to the tangible personal property sold passes to the purchaser in California,~~ It is immaterial that title to the tangible personal property sold passes to the purchaser at a place outside of the local taxing jurisdiction in which the retailer's place of business is located, or that the property sold is never within the local taxing jurisdiction in which the retailer's place of business is located.

* * *

S. 1803 Application of Tax.

(a) Sales Tax

(1) In General. Except as stated below, in any case in which state sales tax is applicable, state-administered Bradley-Burns uniform local sales tax is also applicable if the place of sale is in a county imposing a state-administered local tax. ~~Thus,~~ If the place of sale as defined in Regulation 1802 is in a county having a state-administered local tax, the local sales tax shall apply whether or not the state use tax applies because ~~if~~ title to the property sold passes or is deemed to pass at a point outside this state~~, state-administered local sales tax does not apply regardless of participation in the transaction by a California retailer~~. As explained in paragraphs (b) and (c), the local use tax may apply if Regulation 1802 provides that the place of sale is not in a county having a state-administered local tax.. If so, the retailer is required to collect the use tax and pay it to the board.

Gross receipts from sales of tangible personal property subject to the local tax shall include delivery charges, when such charges are subject to the state sales or use tax.

(2) Exception. State-administered local sales tax does not apply to certain sales of tangible personal property to operators of aircraft to be used or consumed principally outside the county in which the sale is made if such property is to be used or consumed directly and exclusively in the use of the aircraft as common carriers of persons or property under the authority of the laws of the State of California, the United States, or any foreign government. On and after July 1, 1972, for county tax purposes this exemption is limited to 80 percent of the county tax.

(b) Use tax. State administered local use tax applies if the purchase is made from a retailer on or after the effective date of the local taxing ordinance and the property is purchased for use in a jurisdiction having a state-administered local tax and is actually used there, provided any one of the following conditions exist:

(1) ~~Title to the property purchased passes to the purchaser at a point outside this state~~. The retailer's activities in this state do not constitute participation in the purchase transaction under Regulation 1802.

(2) The place of sale under Regulation 1802 is in this state but not in a jurisdiction having a state-administered local tax;

(3) The place of sale is in a jurisdiction having a state-administered local tax and there is an exemption of the sale of the property from the sales tax but there is no exemption of the use of the property from the use tax; or

(4) The property is purchased under a valid resale certificate.

State-administered local use tax does not apply to the storing, keeping, retaining, processing, fabricating or manufacturing of tangible personal property for subsequent use solely outside the state or for subsequent use solely in a county not imposing a local use tax.

(c) Collection of Use Tax by Retailers. Retailers engaged in business in this state and making sales of tangible personal property, the storage, use or consumption of which is subject to state-administered local use tax, are required to collect the tax from the purchaser. It is immaterial that the retailer might not be engaged in business in the particular county or city in which the purchaser uses the property.

Retailers who are not engaged in business in this state may apply for a Certificate of Registration-Use tax. Holders of such certificates are required to collect tax from purchasers, give receipts therefore, and pay tax to the board in the same manner as retailers engaged in business in this state.

As used in this regulation, the term "Certificate of Registration-Use Tax" shall include Certificate of Authority to Collect Use Tax issued prior to September 11, 1957.

(d) Leases. If a lease is a continuing sale, or a continuing purchase, for the purpose of state tax, it shall be a continuing sale, or a continuing purchase, for the purposes of local tax. If a lease is neither a continuing sale nor a continuing purchase for the purposes of state tax, it shall be neither a continuing sale nor a continuing purchase for the purposes of local tax.

Transition Rule

The clarifying amendments to Regulations 1802 and 1803 shall not create any inference with regard to how local tax revenues from leasing transactions should be reported by taxpayers and distributed to participating jurisdictions. Therefore, any inquiries filed under section 7209 with regard to leasing transactions shall be resolved as if these amendments had not been adopted.